(37)

No. 03-1693
Vide 03-1698
Title: McCreary County, Kentucky, et al., Petitioners
v.
American Civil Liberties Union of Kentucky, et al.
Docketed: June 24, 2004
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (01-5935)
Decision Date: December 18, 2003
Rehearing Denied: March 23, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 21 2004	Petition for a writ of certiorari filed. (Response due July 26, 2004)
Jul 21 2004	Order extending time to file response to petition to and including August 9, 2004.
Aug 9 2004	Brief of respondents American Civil Liberties Union of Kentucky, et al. in opposition filed.
Aug 25 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 17 2004	Reply of petitioners McCreary County, Kentucky, et al. filed. (Distributed)
Oct 4 2004	DISTRIBUTED for Conference of October 8, 2004.
Oct 12 2004	Petition GRANTED.
Nov 4 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 8, 2004.
Nov 22 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Dec 3 2004	Brief amici curiae of National School Boards Association. et al. filed.
Dec 6 2004	Brief amicus curiae of Rutherford Institute filed.
Dec 8 2004	Brief amicus curiae of Conservative Legal Defense and Education Fund, et al. filed.
Dec 8 2004	Brief amicus curiae of Judicial Watch, Inc. filed.
Dec 8 2004	Brief amicus curiae of United States filed.
Dec 8 2004	Brief amicus curiae of Becket Fund for Religious Liberty filed.
Dec 8 2004	Brief amici curiae of Ashbrook Center for Public Affairs, et al. filed.
Dec 8 2004	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
Dec 8 2004	Joint appendix filed.
Dec 8 2004	Brief of petitioners McCreary County, Kentucky, et al. filed.
Dec 8 2004	Brief amicus curiae of Alabama, et al. filed.
Dec 8 2004	Brief amicus curiae of Faith and Action, et al. filed.
Dec 8 2004	Brief amici curiae of Minnesota, et al. filed.
Dec 8 2004	Brief amicus curiae of Pacific Justice Institute filed.
Dec 8 2004	Brief amicus curiae of Thomas More Law Center filed.
Dec 8 2004	Brief amicus curiae of Foundation for Moral Law, Inc. filed.
Dec 8 2004	Brief amicus curiae of American Legion filed.
Dec 8 2004	Brief amicus curiae of American Center for Law and Justice filed.
Dec 8 2004	Brief amici curiae of Family Research Council and Focus on the Family filed.

Dec 8 2004	Brief amicus curiae of WallBuilders, Inc. filed.
Dec 8 2004	Brief amici curiae of American Liberties Institute, et al. filed.
Dec 13 2004	Brief amici curiae of American Humanist Association, et al filed. VIDED.
Dec 13 2004	Brief amici curiae of Anti-Defamation League, et al. filed. VIDED.
Dec 15 2004	SET FOR ARGUMENT ON Wednesday, March 2, 2005.
Dec 15 2004	CIRCULATED.
Dec 16 2004	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 4 2005	Brief amicus curiae of American Atheists filed. (Distributed)
Jan 6 2005	Extension of time within which to file respondents' brief on the merits to and including January 21, 2005.
Jan 7 2005	Brief amici curiae of Atheist Law Center, et al. filed. (Distributed)
Jan 7 2005	Brief amicus curiae of Freedom From Relgion Foundation filed. (Distributed)
Jan 10 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 10 2005	Record received from U.S.C.A. - 6th Circuit. (1 binder)
Jan 11 2005	Record received from U.S.D.C., Eastern Dist. of Kentucky. (1 box)
Jan 12 2005	Brief amicus curiae of Council for Secular Humanism and International Academy of Humanism filed. (Distributed)
Jan 21 2005	Brief amici curiae of Americans United for Separation of Church and State, et al. filed. (Distributed)
Jan 21 2005	Brief amici curiae of Legal Historians and Law Scholars filed. (Distributed)
Jan 21 2005	Brief amici curiae of Baptist Joint Committee, et al. filed. (Distributed)
Jan 21 2005	Brief of respondents American Civil Liberties Union of Kentucky, et al. filed. (Distributed)
Feb 4 2005	Motion of Faith and Action, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Feb 18 2005	Motion of Faith and Action, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Feb 18 2005	Application (04A723) to file in excess of page limits, submitted to Justice Stevens.
Feb 22 2005	Reply of petitioners McCreary County, Kentucky, et al. filed. (Distributed)
Feb 22 2005	Application (04A723) denied by Justice Stevens.

03-1693 t/w 03-1698

03-1698

In Conference as of:

October 4, 2004

Briefs not filmed

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

PARTIES

The Petitioners consist of McCreary County, Kentucky, and Jimmie Greene as County Judge Executive of McCreary County, and Pulaski County, Kentucky, and Darrell Beshears, as County Judge Executive of Pulaski County.

The Respondents include the American Civil Liberties Union of Kentucky, Louanne Walker and Dave Howe as residents of McCreary County, and Lawrence Durham and Paul Lee as citizens of Pulaski County.

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OPINIONS BELOW

The opinion of the Court of Appeals (App., 1a - 95a) is reported at 354 F.3d 438. The opinion of the Court of Appeals denying rehearing en banc (App., 189a - 202a) is reported at 361 F.3d 928. The opinion of the District Court in the consolidated case of *ACLU v. McCreary County* (App., 96a - 114a) granting a supplemental preliminary injunction is reported at 145 F. Supp. 2d 845. The opinion of the District Court in *ACLU v. McCreary County* (App., 115a - 138a) granting a preliminary injunction is reported at 96 F. Supp. 2d 679. The opinion of the District Court in *ACLU v. Pulaski County* (App., 139a - 162a) granting a preliminary injunction is reported at 96 F. Supp. 2d 691.

JURISDICTION

The judgment of the Court of Appeals was filed on December 18, 2003. The Court of Appeals denied rehearing en banc on March 23, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Establishment Clause of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

"[G]overnment can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution." *Elk Grove Unified Sch. Dist. v. Newdow*,

concurring slip op. at 5 (O'Connor, J., concurring). This case presents one of those circumstances. This is one of those cases where "some references to religion in public life and government are the inevitable consequence of our Nation's origins." *Id.* at 3. The Defendants have attempted to display documents and symbols on the origin of American law and government. Inevitably, such a display will include religious references without violating the Constitution.

This case began as a challenge to displays containing the Ten Commandments brought by the American Civil Liberties Union of Kentucky and several Kentucky citizens ("Plaintiffs"). The Plaintiffs filed three separate complaints and motions for preliminary injunction on November 18, 1999, against McCreary and Pulaski Counties and the Harlan County School District.[1] The complaints originally challenged a display in McCreary and Pulaski Counties consisting of a single copy of the Ten Commandments. (App., 6a).

Shortly after the lawsuit was filed, and before a hearing on the motions, the Defendants amended the displays in an attempt to bring them within constitutional boundaries. (App., 7a) ("Second Display"). The Second Display consisted of the following:

(1) An excerpt from the Declaration of Independence.
(2) The Preamble to the Kentucky Constitution.
(3) The National Motto of the United States.

[1]Harlan County has separately petitioned this Court for a Writ of Certiorari due to the constitutional and factual differences involved in that case.

(4) A page from the Congressional Record dated February 2, 1983, declaring 1983 to be the year of the Bible and containing a copy of the Ten Commandments.
(5) A proclamation by President Lincoln declaring a National Day of Prayer.
(6) A quote from President Lincoln that stated, "The Bible is the best gift God has ever given to man."
(7) A proclamation by President Reagan proclaiming 1983 the year of the Bible.
(8) The Mayflower Compact.

(App., 7a). Most of the documents were included in their entirety, but the excerpted portions of the Declaration of Independence and the quote from President Lincoln presented primarily the religious references in the documents. *Id.*

The Plaintiffs pursued their requests for a preliminary injunction despite the modifications to the displays, and the District Court held a hearing on April 20, 2000. On May 5, 2000, the District Court entered separate orders granting preliminary injunctions and ordering that the displays be removed immediately and that no similar displays be erected in the future. (App., 8a, 137a-138a, 161a-162a).

After the initial Preliminary Injunctions were entered, the Defendants hired new counsel and filed a Motion to clarify the District Court's Injunction so as to determine whether any of the documents could ever be re-posted in a constitutional

manner.[2] (App., 4a). The District Court denied the Motion to Clarify stating that "the injunction speaks for itself." *Id.*[3]

Defendants modified the displays again in an attempt to bring them within constitutional boundaries. ("Third Display"). The Third Display contained the following ten documents placed in eleven equal size frames:

(1) The full text of the Declaration of Independence (App., 190a-195a).
(2) The entire lyrics of the Star Spangled Banner (App. 185a-186a).
(3) The full text of the Mayflower Compact (App., 188a).
(4) The full text of the Bill of Rights (App., 196a-198a).
(5) The full text of the Magna Carta (App. 199a-212a) (contained in two equal frames).[4]
(6) The complete National Motto (App. 184a).
(7) The entire Preamble to the Kentucky Constitution (App. 184a).
(8) The full text of the Ten Commandments (App., 189a).

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[2]Defendants also filed a Notice of Appeal with the Sixth Circuit. This appeal was dismissed voluntarily after the Defendants modified the display again. (App., 4a).

[3]At a subsequent hearing, the District judge acknowledged that the order barring "no similar displays" was unclear. (Joint Appendix on appeal to Sixth Circuit at 220).

[4]The Magna Carta was displayed in two frames due to size.

(9) A picture of Lady Justice (App. 187a).
(10) An explanatory document entitled "The Foundations of Law and Government Display" explaining the significance of each of the documents in the display (App., 206a-210a).

(App., 9a-10a, 206a-212a). The explanatory document states that the "display contains documents that played a significant role in the foundation of our system of law and government." (App., 10a, 60a, 206a). Among other descriptions, the explanatory document describes the Declaration of Independence as "[p]erhaps the single most important document in American history." (App. 207a). The Magna Carta is described as, "By signing Magna Carta, King John brought himself and England's future rulers within the rule of law." (App. 208a). The document also describes the Ten Commandments by stating:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

(App. 207a).

None of the documents are set apart or have any greater prominence than any other document. (App., 60a, 178a, 179a). Each of the documents is placed in a frame that is exactly the same size. The Ten Commandments is only one of eleven equal sized frames. *Id.* Each of the County Courthouses also contains numerous other historical documents on display *in addition* to the Third Display. In McCreary County, there are 58 historical documents posted in the Judge's office, 41 in the waiting room, 124 in the side entrance to the courthouse, 33 in the fiscal courtroom, and 28 in the conference room. (Record on appeal to Sixth Circuit #5, Mem. in Support of Motion to Dismiss at 6). Likewise, the Pulaski County courthouse, as part of its 200th anniversary of the County, posted numerous historical documents in the Judge's office, in the waiting room, in the side entrance to the courthouse, in the fiscal courtroom, and in the conference room. (Record on appeal to the Sixth Circuit #6, Mem. in Support of Motion to Dismiss at 6).

After the Third Display was erected, the Plaintiffs filed a Motion in the District Court seeking a supplemental preliminary injunction. The District Court issued a supplemental preliminary injunction and ordered that the Third Displays be removed immediately. (App., 113a-114a).

Defendants appealed and a divided panel of the Sixth Circuit affirmed in a fractured opinion. (App., 1a-95a). Two judges found the Third Display violated the purpose prong of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). (App., 16a-42a). The judge who wrote the opinion commented on the effects prong, but no one joined him. (App. 51a). One judge dissented and would have held that the Third Display was constitutional. (App., 52a-95a). The court held that the

Defendants must "present the Ten Commandments objectively and integrate them with a secular message." (App., 22a). The court also held that the constitutionality of the display must be judged by viewing the content of the display, the context of the display and the evolution of the displays. (App., 24a). In viewing the content of the display, the court held that the content of the displays did nothing to detract from the religious nature of the Ten Commandments because the historical documents did not demonstrate an "analytical or historical connection with the other documents." (App., 24a-34a). The court held the context of the display was religious because the Ten Commandments was "blatantly religious" and was not a "passive symbol" of religion. (App. 35a). Finally, the court held that the evolution of the display demonstrated that the Defendants' actions had an "unconstitutional taint" because of the original display. (App., 41a). The court held the display lacked a secular purpose. (App., 42a). The dissent would have upheld the Third Display based on *Lynch* and *Allegheny*. (App., 52a-95a). The dissent took particular exception with the court's requirement that the Defendants establish an analytical and historical link between the Ten Commandments and the other documents on display, pointing out that neither *Lynch* nor *Allegheny County* require such a connection. (App., 76a-82a).

Defendants sought rehearing en banc, and in an opinion dated March 23, 2004, the Sixth Circuit denied the Petition for rehearing en banc with the judge who wrote the majority opinion concurring and two judges dissenting, in which they pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. (App., 96a-109a). The dissent from the denial of rehearing found troubling the opinion's requirement of a historical and an analytical connection and

the opinion's treatment of the past history of the display as "tainting" the present display. (App., 172a-175a). The dissent wrote that no court has ever required an analytical or historical connection and that the history of the displays is entitled to "considerably less weight than the majority gives it." (App. 173a-174a). The dissent scoffed at the novel "theory of indelible, unconstitutional 'taint.'" (App. 83a). The dissent correctly stated, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." (App. 84a).The dissent correctly pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. (App., 96a-109a).

REASONS FOR GRANTING THE PETITION

I.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THE THIRD, FIFTH, TENTH AND ELEVENTH CIRCUITS AND THE COLORADO SUPREME COURT.

The Sixth Circuit's opinion conflicts with the Third Circuit's decision in *Freethought Society v. Chester Cty.*, 334 F.3d 247 (3d Cir. 2003), the Fifth Circuit's decision in *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), the Tenth Circuit's decisions in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), the Eleventh Circuit's decision in *King v. Richmond Cty.*, 331 F.3d 1271 (11th Cir. 2003) and the Colorado Supreme Court's decision in *Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013

(Col. 1995).

The Third Circuit upheld a stand alone bronze Ten Commandments plaque that had been on a county courthouse since 1920. *Freethought Society*, 334 F.3d. at 250. "While the Ten Commandments are undeniably religious, the Supreme Court has held that the context of an otherwise religious display can render the message of the overall display as not endorsing religion." *Id.* at 263.The court stated that a reasonable observer aware of the history of the plaque would not perceive endorsement. *Id.* at 265. The court held that the county had a secular purpose of displaying the Ten Commandments as a key source of our laws. "Given the relatively low threshold required by the purpose prong of *Lemon* (the purpose of the display does not have to be exclusively secular and courts normally defer to the stated purpose of the display), it would appear that the Commissioners' articulations are sufficient to demonstrate a legitimate secular purpose." *Id.* at 267 (citation omitted). The Third Circuit conflicts with the Sixth Circuit regarding the purpose prong and the perception of a reasonable observer regarding the Ten Commandments.

In *Van Orden*,[5] the Fifth Circuit upheld a granite monument containing the Ten Commandments on the Texas State Capitol grounds. *Van Orden*, 351 F.3d at 173. The Ten Commandments monument was placed on the Capitol grounds in 1961 after the State accepted it as a gift from the Fraternal Order of Eagles. *Id.* at 176. The Capitol grounds contain sixteen other monuments regarding Texas history

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[5]The *Van Orden* case is currently pending before this Court on a Petition for Writ of Certiorari. *See* Case No. 03-1500.

spread throughout a large area. *Id.* The Fifth Circuit held that the monument was accepted by the State with the secular purpose of honoring the efforts of the Eagles to reduce juvenile delinquency. *Id.* at 178-79. The court rejected the argument that the State had a religious purpose because the Ten Commandments has a religious message. *Id.* at 179-80.

In contrast, the Sixth Circuit's opinion held that the Ten Commandments has a religious message and that the Defendants did nothing to "integrate the Ten Commandments with a discussion or display of a secular subject matter." (App., 33a). The Sixth Circuit, in conflict with the Fifth, required a demonstration of an "analytical connection" between the Ten Commandments and a secular subject matter.

The Sixth Circuit also conflicts with the Tenth Circuit's decisions in *Anderson* and *Summum*. In *Anderson*, the court upheld a stand alone Ten Commandments monument on city-county courthouse grounds. *See Anderson*, 475 F.2d at 30. The court found the monument had a secular purpose and effect even though one of the articulated purposes of the monument was "to inspire respect for the law of God...." *Id.* at 33. "[W]e cannot say that the monument, as it stands, is more than a depiction of a historically important monument with both secular and sectarian effects." *Id.* at 34. The Tenth Circuit recently affirmed *Anderson* in *Summum*. *See Summum*, 297 F.3d 995, 999-1000 (10th Cir. 2002) (upholding Ten Commandments); *see also Society of Separationists v. Pleasant Grove City*, Case No. 2:03-CV-839-J (D. Utah May 28, 2004) (upholding Ten Commandments in city park), *available at* http://www.utd.uscourts.gov/reports/ 00000034.pdf (last

visited June 17, 2004).

The Eleventh Circuit's decision in *King*, 331 F.3d at 1271, also conflicts with the Sixth Circuit. In *King*, the court upheld the Ten Commandments on a city seal. The Richmond County seal had been used since 1872 and contained an outline of the Ten Commandments, a sword and the name of the court. *Id.* at 1273. The court held the seal had a secular purpose because the Ten Commandments was a recognizable symbol of law and that the use of the seal to validate legal documents, the use of other symbols on the seal, the small size of the seal and the length of time the seal had been used did not send a message of endorsement. *Id.* at 1282-86.

In *Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Col. 1995), the Colorado Supreme Court upheld a stand alone Ten Commandments in a state park. After finding that the Ten Commandments was one of the "smallest and least conspicuous" displays in the park and that "in the immediate vicinity" was a larger statue and a monument, the court held that the "content and the context of the monument negate[s] any suggestion that the government is endorsing religion." *Id.* at 1025.

If the Ten Commandments may be displayed as a symbol of secular law, then they may be displayed as *one* of the documents that has played a role in the founding of our system of law and government. If a stand-alone monument of the Ten Commandments has a secular purpose and does not endorse religion, then how much more does the Third Display have a secular purpose because the Ten Commandments are dwarfed by other secular historical documents.

The Third, Fifth, Tenth and Eleventh Circuits and the Colorado Supreme Court conflict not only with the Sixth Circuit, but also with the Sixth, Seventh and Eleventh Circuits as well as numerous District Court decisions.[6] Cases in the Sixth Circuit have reached conflicting results. *See Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (striking down Ten Commandments on Capitol grounds in a 2-1 decision); *ACLU v. Hamilton Cty.*, 202 F. Supp.2d 757 (E.D. Tenn. 2002) (striking down single copy of Ten Commandments in courtroom); *ACLU v. Grayson Cty.*, 2002 WL 1558688 (W.D. Ky. 2002) (striking down Ten Commandments with other historical documents); *ACLU v. Ashbrook*, 211 F. Supp.2d 873 (N.D. Ohio 2002) (striking down Ten Commandments in courtroom); *ACLU v. Rutherford Cty.*, 209 F. Supp.2d 799 (M.D. Tenn. 2002) (striking down Ten Commandments with other historical documents under purpose prong but upholding under effects prong); *ACLU v. Mercer Cty.*, 240 F. Supp.2d 623 (E.D. Ky. 2003) (upholding Ten Commandments with other historical documents).

Cases in the Seventh Circuit have held displays of the Ten Commandments unconstitutional. *See Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (striking down Ten Commandments monument in a 2-1 decision); *Indiana Civil Liberties Union, Inc. v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001) (striking down Ten Commandments monument in a 2-1 decision); *Kimbley v. Lawrence County*, 119 F. Supp.2d 856 (S.D. Ind. 2000) (striking down Ten Commandments

[6] The Eighth Circuit held in one case that a display of a Ten Commandments monument violated the Establishment Clause. *See ACLU v. Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004) However, that case has been vacated pending rehearing en banc.

monument on courthouse lawn); *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003) (striking down City's sale of property containing Ten Commandments to private group and finding unconstitutional).

Cases in the Eleventh Circuit have reached conflicting results. While *King* upheld a Ten Commandments display, other cases have struck them down. *See Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (striking down Ten Commandments monument in Alabama Supreme Court building); *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993) (striking down Ten Commandments in courthouse but allowing county to modify the display); *Turner v. Habersham Cty.*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003) (striking down Ten Commandments in county courthouse).

Other District Court cases have likewise reached divergent results. *See Ring v. Grand Forks Public Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980) (striking down statute requiring display of Ten Commandments in classrooms); *Suhre v. Haywood County*, 55 F. Supp.2d 384 (W.D.N.C. 1999) (upholding Ten Commandments displayed with other items in courtroom).

The Circuits are fractured over displays containing the Ten Commandments. Some of these decisions with opposing holdings contain exactly the same Ten Commandments displays (either stand alone or with historical documents). This Court should resolve the conflict and establish clarity to the Establishment Clause jurisprudence.

II.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE DISPLAY OF RELIGIOUS SYMBOLS.

The Sixth Circuit conflicts with this Court's precedent in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

This Court has stated that government may display a religious symbol in connection with other secular symbols and doing so avoids the appearance of endorsement of religion. *See Lynch* and *County of Allegheny*. In *Lynch*, this Court, in a fractured opinion, upheld the constitutionality of a nativity scene in a Christmas display that also contained such items as a Santa Claus house, a Christmas tree and a "Season's Greetings" banner. *Id.* at 671. This Court held that the inclusion of a nativity scene in the Christmas display did not send a message of endorsement of religion because, "The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions." *Id* at 692 (O'Connor, J., concurring).

In *County of Allegheny*, this Court upheld the display of a Menorah in a seasonal display, but struck down the display of a creche. The creche was held unconstitutional because it was by itself on the Grand Staircase of the county courthouse, but, "No figures of Santa Claus or other decorations appeared on the Grand Staircase." *Id.* at 580-81. In contrast, the

Menorah was displayed with a Christmas tree. *Id.* at 581. With regard to the creche, the Court stated that, "nothing in the context of the display detracts from the creche's religious message." *Id.* at 598. With regard to the Menorah, this Court held that the inclusion of a Christmas tree and a sign saluting liberty would not lead a reasonable observer to believe that the county was endorsing religion. *Id.* at 620.

In contrast to these cases, the Sixth Circuit held that the inclusion of the Ten Commandments with other secular symbols and documents had only a religious purpose, in part, because the Ten Commandments was "blatantly religious" and was not a "passive symbol" of religion. (App. 35a). This decision conflicts with *Lynch* and *County of Allegheny*. The opinion turns Establishment Clause jurisprudence on its head and requires that the Defendants affirmatively establish an "analytical and historical link" between the documents on display. Neither *Lynch* nor *County of Allegheny* required the affirmative demonstration of a link. Indeed, if Frosty the Snowman and Santa Claus are analytically and historically linked to a nativity scene, then so are the Ten Commandments linked with the historical documents in this display. Requiring the Defendants to demonstrate an analytical and historical link (whatever that means) between the documents in the display completely side-steps the objective reasonable observer test and places a subjective, unreasonable observer (someone who must be convinced, instead of someone who merely objectively views the display) in its place.[7] As Justice

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[7]The Sixth Circuit majority decided the case on the purpose prong, yet the decision discusses a reasonable observer. In *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1542-45 (1992) (en banc), and *Granzeier*

O'Connor recently stated:

> Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any governmental action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. Second, because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.

Elk Grove Unified Sch. Dist. v. Newdow, concurring slip op. at 2-3 (June 14, 2004) (O'Connor, J., concurring). The reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring). In discussing the reasonable observer in the context of a display of a religious document or symbol, this Court has also stated:

> There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable. It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. As I explained in *Allegheny*, "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." **Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display.**

Pinette, 515 U.S. at 780 (emphasis added). The Sixth Circuit's opinion fell into the trap of assuming that the reasonable observer was either ignorant or bent on a mission to eradicate religious symbols. Instead, the reasonable observer is deemed aware of the history and ubiquity of the challenged practice.

Understanding the history and widespread use of the documents in the display focuses the objective observer on over three hundred years of history and use and prevents a

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v. Middleton, 173 F.3d 568, 573 (6th Cir. 1999), the Sixth Circuit ruled that the reasonable observer is relevant only on the effects prong. From this Court's decisions it is not clear whether the reasonable observer is relevant to the purpose prong. *See Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) (stating that the inquiry under the purpose prong is whether the government intends to send a message of endorsement); *County of Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring) (applying endorsement test but not applying purpose prong).

"heckler's veto" by an observer who is not reasonable and who simply is unaware of what this Court has stated numerous times: that the Ten Commandments have played a role in the founding of our system of law and government. *See Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 459 (1961) (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("It is equally undeniable ... that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."); *Lynch*, 465 U.S. at 677-78 (describing the depiction of Moses with the Ten Commandments on the wall of the Supreme Court chamber and stating that such acknowledgments of religion demonstrate that "our history is pervaded by expressions of religious beliefs...."); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (acknowledging that the Ten Commandments did not play an exclusively religious role in the history of Western civilization).

The reasonable observer is aware of the impact of religion on our society and does not view the Ten Commandments and historical documents display on a clean slate, but is charged with knowledge of the role of religion in American law and government. This Court made clear in *Lynch* and *Allegheny* that the reasonable observer is an objective test and demonstrates someone who understands the history and ubiquity of a practice and does not need an "analytical

connection" explanation. The dissent noted in the Sixth Circuit opinion:

> Thus, neither *Lynch*, nor *Allegheny*, nor any other decision, and certainly not *Stone*, support the majority's rule that a government that wishes to use a religious symbol in a public display must integrate that symbol into a secular curriculum. As if the absence of authority were not enough, common sense militates against such a rule. Government monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose.

(App., 81a).

This Court has never mandated that a governmental display contain an "analytical link" between the documents on display. Instead, this Court's precedent requires that the display, when viewed by an informed reasonable observer, not convey a message of endorsement. The Sixth Circuit replaces the objective observer with a subjective, unreasonable observer.

III.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT ON THE PAST HISTORY OF A CHALLENGED PRACTICE.

The Sixth Circuit's opinion also conflicts with precedent

from this Court concerning the past history of a display of religious symbols. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) and *Edwards v. Aguillard*, 482 U.S. 578 (1987). The Sixth Circuit's opinion demands that, when viewing the purpose of a governmental action, the history of the display must be taken into account, and that any negative history forever taints future displays.(App., 22a). The Sixth Circuit's opinion actually conflicts with *Santa Fe* and *Edwards*.

In *Santa Fe*, the School District had a long-standing practice of a student giving a prayer over the loudspeaker before football games. *See Santa Fe*, 530 U.S. at 294. The District, during the course of litigation, adopted four separate policies. *Id.* at 296-98. The last Policy the District adopted was termed the "October Policy". *Id.* at 298. In reviewing the constitutionality of the October Policy, the Court reviewed the purpose in light of the "text and history" of the October Policy. *Id.* at 308. The Court stated, "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Id.* In conducting the inquiry into whether the enunciated purpose of the October Policy was insincere or a sham, the Court stated:

> According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." We note, however, that the District's

> *approval of only one specific kind of message*, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that *only one student is permitted to give a content-limited message* suggests that this policy does little to "foste[r] free expression."

Id. at 309 (citations omitted) (emphasis added).

The *Santa Fe* Court held that the October Policy's enunciated secular purpose was insincere or a sham because the enunciated secular purpose and what, in actuality, was occurring at the football games did not "match up." The District's Policy of allowing one student access to the microphone for the sole purpose of giving an invocation, the content of which was severely limited by the Policy did not "match up" with the District's assertion that it was promoting student free speech. This Court, when viewing the inconsistency between enunciated purpose and actual conduct, stated, "The District further asks us to accept what is obviously untrue: that these messages are necessary to 'solemnize' a football game and that this single-student, year-long position is essential to the protection of student speech." *Id.* at 315. Additionally, even though the school had adopted a new policy, it continued to operate under the old practice. The person selected under the old practice to give the invocation was the same person still giving the invocation under the new policy and the school did not conduct a new student election after the new policy was adopted. The articulated purpose was a sham because the school had not

changed its practice even though it adopted a new policy.[8]

The *Santa Fe* case is similar to *Edwards* where this Court was asked to decide the constitutionality of a Louisiana statute that forbade the teaching of evolution in public schools unless creationism was also taught. 482 U.S. at 581. The Court viewed the articulated secular purpose of the statute and held it was insincere or a sham because the articulated purpose did not "match up" with the terms of the statute. The Court stated:

> True, the Act's stated purpose is to protect academic freedom.... Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

Id. at 586. The Court held that because the articulated purpose did not "match up" with the actual practice, it was insincere.

This Court has never allowed the history and evolution of a policy to be a *primary* factor in determining the purpose behind the policy *except* in cases where the articulated secular purpose and the practice in actuality are not congruent. Such

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[8]As the dissent in the Sixth Circuit's case stated, "At most, *Santa Fe* held that a modified policy, or display, cannot be used as a shield to prevent litigation. However, *Santa Fe* does not state that a history of unconstitutional displays can be used as a sword to strike down an otherwise constitutional display." (App., 87a).

is not the case here where the articulated secular purpose is to display documents that played a significant role in the founding of our system of law and government, and where the Ten Commandments is only one of many displays.[9] This purpose, when viewed in light of the actual display is clearly not a sham or an insincere purpose. If the Defendants had articulated a purpose of displaying documents that played a role in the founding of our system of law and government, and then actually displayed a sermon from Billy Graham or the lyrics of a religious song authored in 2004, it would be clear that the articulated purpose and the actual conduct were not congruent leading to the ineluctable conclusion that the articulated purpose was a sham. However, the Defendants in this case accomplished their purpose. The articulated purpose and the actual conduct "match up."

The Sixth Circuit's opinion, in essence, establishes a *per se* rule that whenever government has violated the Constitution in the past, its present actions on the same issue are per se unconstitutional. The dissent termed this novel theory the "theory of indelible, unconstitutional 'taint.'" (App. 83a). The dissent correctly stated, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." (App. 84a). Adopting the Sixth Circuit's "indelible, unconstitutional 'taint'" theory leads to absurd results. How long will a past action taint a government's efforts? What must be done to

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[9]Defendants dispute that they enunciated five different secular purposes throughout this litigation. Instead, the secular purpose has always been to display documents and symbols that had an impact in the development of our system of law and government.

remove the taint? Is a government's protestations of current constitutionality sufficient tor remove the taint? Indeed, the Sixth Circuit's "indelible, unconstitutional 'taint'" theory seems to be punitive in nature.

The dissent in the Sixth Circuit opinion stated that "the majority seems to envision a display that contains a recounting of the history of the nation's founding, a summary of American constitutional law and history, perhaps a syllogism incorporating the foregoing, and, I suppose, at least as much evidence as was presented to this court in the official record of more than 200 pages." (App., 76a-77a). The dissent further observed that "in order to integrate the Ten Commandments into a secular curriculum in a manner that would satisfy the majority's new rule, the defendants would have to append to their displays a library of learned treatises and court briefs, or perhaps audio or video accompaniment, explaining beyond all reasonable doubt and in great detail what most Americans already know and the courts have expressly recognized: that 'the Ten Commandments no doubt has played a role in the secular development of our society.' Books [*v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000)]." (App., 81a-82a).

The conflict with the Sixth Circuit's opinion is clear when viewed in light of this Court's statements that the line between constitutional and unconstitutional conduct "is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'" *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985)(*citing Lemon*, 403 U.S. at 614; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lynch*, 465 U.S. at 673). This Court should accept this case to correct this

error.

IV.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH A PRIOR DECISION FROM THE SAME CIRCUIT AND WITH THE THIRD AND SEVENTH CIRCUITS ON THE EFFECT OF A GOVERNMENTAL ENTITY'S ALLEGED PAST UNCONSTITUTIONAL PURPOSE.

The legal effect of a governmental entity's past alleged unconstitutional conduct is a question of extreme public importance. The Sixth Circuit's opinion conflicts with a prior decision of the same Circuit, the Third and the Seventh Circuits. The opinion holds that the Defendants' past conduct concerning the displays bears directly on the present purpose, and permanently taints any future displays. (App., 36a-42a). The opinion conflicts with the Third Circuit's decision in *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), with the Seventh Circuit's decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), and with the Sixth Circuit's own opinions in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) and *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002).

In *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), the ACLU filed suit to declare a holiday display containing a creche unconstitutional. The original display contained a Menorah and a Christmas tree and had been displayed in front of the City Hall in Jersey City for many decades. *Id.* at 94-95. The District Court enjoined that display and "any substantially similar scene or display." *Id.* at 96. After the injunction, the City erected a modified display that included

a Christmas tree and a Menorah, but also included a creche, Santa Claus, Frosty the Snowman, a sled, Kwanzaa symbols and two disclaimer signs. *Id.* The ACLU moved to hold the City in contempt and also sought a preliminary injunction against the modified display. *Id.* The District Court denied both motions. *Id.* The Third Circuit Court of Appeals came to the opposite conclusion of the Sixth Circuit in this case. The Plaintiffs argued that the inclusion of secular symbols was "a ploy designed to permit continued display of the religious symbols." *Id.* at 105. In response the Third Circuit stated:

> The suggestion seems to be that, even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the City officials were motivated by a desire to evade constitutional requirements and that this motivation required invalidation of the modified display. Asked during oral argument whether this meant that Jersey City might be precluded from erecting a display identical to one that would be permissible in other nearby cities, *counsel for the plaintiffs insisted that Jersey City's "prior history" would have to be taken into account, at least until the time came when it could be considered to be "purged" of the "prior constitutional taint*." Oral Arg. Tr. at 27.

We reject this argument. The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (citations omitted) (emphasis added). The Third Circuit went on to explain:

> The plaintiffs' position is also contrary to the Supreme Court's treatment of the two displays at issue in *Allegheny County*. If the plaintiffs' view were correct, the erection of the unconstitutional display on the Grand Staircase of the County Courthouse should have militated in favor of also striking down the display in front of the City-County Building, but a majority of the Supreme Court sustained that display, and not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building.

Id. at 105 n.12.

The Third Circuit has clearly rejected the approach taken by the Sixth Circuit in this case. One misstep in the Establishment Clause minefield should not spell disaster for future conduct. If a past mistake casts a looming shadow over the future, then when can the government move from under the shadow? Once the District Court in this case issued a preliminary injunction, the Defendants were faced with the question of how to remedy their conduct to bring themselves within constitutional boundaries. They could either completely remove the displays, or follow the approach taken by Jersey City in *Schundler* and modify the displays. Either option is a valid means of correcting a constitutional violation. Adopting the Sixth Circuit's rationale would lead to a host of unanswerable questions such as, how long is long enough before a new display may be erected, does there have to be an intervening change in the governing body before the

"taint" is "purged," or does the government have to seek approval from the Court before it may put up a new display. The Defendants must be allowed to correct a prior unconstitutional wrong. Otherwise, one governmental body could erect an identical display absent the prior history and have the display upheld. *See ACLU v. Rutherford Cty.*, 209 F. Supp.2d 799 (M.D. Tenn. 2002) (striking down identical display as here under the purpose prong but upholding under effects prong where the government had a prior resolution that was never acted upon calling for the display of the Ten Commandments);*ACLU v. Mercer Cty.*, 240 F. Supp.2d 623 (E.D. Ky. 2003) (upholding the identical display as here under both the purpose and effects prong where the courthouse had no prior history with the Ten Commandments display).

In *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit struck down a statewide Good Friday closing law because it was intended to advance a religious holiday. However, even though the Court had just struck down the Good Friday closing law on the grounds that it advanced a religious purpose, Judge Posner reasoned that the State of Illinois could continue with the Good Friday closing by adopting a secular rationale for the closing. Judge Posner stated, "And we have left open the possibility that Illinois can accomplish much the same thing either by officially adopting a 'spring weekend' rationale for the law, in place of the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts." *Id.* at 623-24. *Metzl* recognized what the Sixth Circuit did not that a previous unconstitutional purpose does not forever "taint" a governmental action and that it is possible for government to correct an unconstitutional purpose. Similarly, in striking down a Ten Commandments display, the Seventh Circuit

allowed the display to be modified, noting the state of Indiana "retains the authority to make decisions regarding the placement of the monument." *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000).

In *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), the Sixth Circuit was asked to decide whether closing governmental offices for Good Friday violated the Establishment Clause. *Id.* at 571. In 1996, shortly before the plaintiffs in that case filed their lawsuit, a governmental official had posted a sign that depicted a crucifix and stated that the offices were closed in observance of Good Friday. *Id.* The defendants in that case admitted that the signs were unconstitutional and promised to never post them again. *Id.* The plaintiffs, however, argued that the government's articulated purpose for closing the offices on Good Friday (that the weekend had turned into a spring weekend with little activity and many people on vacation) was a sham because of the posting of the sign with the crucifix in 1996. *Id.* at 574. The Sixth Circuit stated, in regards to plaintiffs' argument, "This argument implies that the sign posted for several days in 1996 irrevocably established an endorsement of religion, from which Defendants cannot retreat." *Id.* The Sixth Circuit rejected that argument, stating that it preferred Judge Posner's reasoning in the case of *Metzl*. *Granzeier* recognized that if Illinois could reinstate its law with a constitutional purpose, there was no reason why one past action that was arguably unconstitutional should forever taint future conduct to the point where the defendant could never act constitutionally. 173 F.3d at 574.

The Sixth Circuit held in *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) that a Ten Commandments monument was

unconstitutional but explicitly held that the State of Kentucky could correct its unconstitutional purpose by modifying the display. The Court stated, "[W]e do not hold that the Commonwealth of Kentucky can never display the Ten Commandments or this monument in particular.... [W]e are nevertheless confident that... the Commonwealth can permissibly display the monument in question." *Id.* at 489-90.

Government must be allowed to correct its past unconstitutional actions and cannot be forever bound if it missteps in the Establishment Clause minefield. The Sixth Circuit's opinion conflicts with precedent from the Third and Seventh Circuits and the Sixth Circuit's own precedent. This Court should accept this case and resolve the conflicts.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 01-5935

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

PLAINTIFFS-APPELLEES,

V.

MCCREARY COUNTY, KENTUCKY, ET AL.

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
Nos. 99-00507; 99-00508; 99-00509—
Jennifer B. Coffman, District Judge.
Argued: December 4, 2002
Decided and Filed: December 18, 2003
Before: RYAN, CLAY, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Mathew D. Staver, LIBERTY COUNSEL,

Longwood, Florida, for Appellants. David A. Friedman, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellees. ON BRIEF: Mathew D. Staver, Erik W. Stanley, LIBERTY COUNSEL, Longwood, Florida, Johnnie L. Turner, LAW OFFICES OF JOHNNIE L. TURNER, Harlan, Kentucky, for Appellants. David A. Friedman, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellees. David R. Huggins, NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia, for Amicus Curiae.

CLAY, J., delivered the opinion of the court. GIBBONS, J., delivered a separate concurring opinion. RYAN, J., delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Defendants, two Kentucky counties and a county school district, as well as three officials of these governmental entities, appeal from the district court's order granting Plaintiffs' motion for a supplemental preliminary injunction prohibiting Defendants from displaying copies of the Ten Commandments in three separate displays on the basis that Plaintiffs showed a strong likelihood of succeeding on their claim that Defendants' displays violated the Establishment Clause of the First Amendment. For the reasons set forth below, we AFFIRM.

I.

BACKGROUND

A. Procedural History

On November 18, 1999, seven individuals in three Kentucky counties (McCreary County, Harlan County, and Pulaski County) along with the American Civil Liberties Union ("ACLU") filed three lawsuits in the United States District Court for the Eastern District of Kentucky, alleging that these counties had erected displays consisting of framed copies of the Ten Commandments in the county courthouses of McCreary and Pulaski Counties, as well as in the schools of the Harlan County School District, in violation of the Establishment Clause of the First Amendment.[4] Plaintiffs

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[4] The three lawsuits were considered as one by the district court, and are so considered on appeal. *See ACLU of Ky. v. McCreary County, Ky.*, 96 F. Supp. 2d 679, 682 n.2 (E.D. Ky. 2000) ("This is one of three companion cases, simultaneously filed, which attack such displays. Any minimal variances among the three displays possess no legal significance for the purpose of the motions now pending before the court. Having observed that the case records also share similar complaints, memoranda, and motions and that the three cases share identical lead counsel on both sides, the court combined the three for oral argument and today enters virtually identical opinions— with necessary but slight factual variations—in all three."). The three opinions of which the district court spoke are as follows: *ACLU of Ky. v. McCreary County, Ky.*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) ("*McCreary I*"); *ACLU of Ky v. Pulaski County*, Ky., 96 F. Supp. 2d 691 (E.D. Ky. 2000); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000). The district court eventually

sought a declaration that the displays were unconstitutional, as well as preliminary and permanent injunctive relief enjoining the counties from continuing their display of the Ten Commandments.

Shortly after the complaint was filed, Defendants modified the displays to include secular historical and legal documents, some of which were excerpted, and then filed respective motions to dismiss. Following a hearing held on April 20, 2000, the district court issued an order on May 5, 2000 in each of the three cases which denied Defendants' motions to dismiss and granted Plaintiffs' motions for preliminary injunctive relief; the court ordered that the displays be removed and that no similar displays be erected. Defendants filed a notice of appeal to this Court, and a motion to stay the injunction pending appeal. The district court denied the motion to stay, as did this Court.

Defendants allegedly obtained new counsel and then filed a motion to clarify the district court's preliminary injunction as to all Defendants regarding the court's prohibition against erecting "similar displays." The district court denied the motion for clarification on September 15, 2000, stating that "the injunction speaks for itself." (J.A. at 119.)

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consolidated the three cases under case number 99-507. All Defendants filed a single notice of appeal from the district court's June 22, 2001, order granting Plaintiffs' motion for a supplemental preliminary injunction. *ACLU of Ky. v. McCreary County, Ky.*, 145 F. Supp. 2d 845 (E.D. Ky. 2001) ("*McCreary II*) (order granting Plaintiffs' motion for supplemental preliminary injunction).

Defendants, allegedly acting on the belief that a display containing the Ten Commandments could be erected within the parameters of the Constitution, voluntarily dismissed their appeal to this Court and erected new displays containing several additional secular historical and legal documents in their entirety, along with the Ten Commandments. The courthouse displays contained an explanation entitled the "Foundations of American Law and Government Display" which explained that the displays included various documents that played a significant role in the founding of the American system of law and government. The school district displays contained similar documents to the courthouse displays, except instead of the "Foundations of American Law and Government Display" explanation, the School Board displays contained a School Board Resolution. The Resolution addressed the historical context of the displays and opened a forum for the community to post an unlimited number of additional historical documents.

As a result of these new displays, Plaintiffs filed a motion to hold Defendants in contempt for violating the district court's preliminary injunction or, in the alternative, to enter a supplemental preliminary injunction order. Defendants responded to Plaintiffs' motion by arguing that the new displays were not similar to the previous displays, and contended that the "purpose for the display is to educate citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." (J.A. at 151.)

A hearing was held on March 30, 2001, at which time the district court denied Plaintiffs' motion for contempt, and on April 2, 2001. the court entered a corresponding order

denying the motion for contempt, while urging the parties to settle the matter. The court noted in the order, however, that if the parties could not reach a settlement by April 30, 2001, the court would rule upon Plaintiffs' motion for a supplemental preliminary injunction. The parties failed to reach a settlement, and the district court then issued an order granting Plaintiffs' motion for a supplemental preliminary injunction on June 22, 2001. It is from the district court's order granting Plaintiffs' motion for a supplemental preliminary injunction that Defendants now appeal.

B. Facts

In 1999, McCreary County erected a display of the Ten Commandments in the McCreary County Courthouse consisting of "at least one framed copy of one version of the Ten Commandments and [which] was not part of any larger educational, historical, or retrospective exhibit." *McCreary I, supra* note 1, at 684. The display was erected pursuant to an order signed by Defendant Jimmie Greene, McCreary County Judge Executive. *Id.* Likewise, Pulaski County officials erected a copy of the Ten Commandments in the Pulaski County courthouse in the same fashion. *Pulaski, supra* note 1, at 695. The Pulaski display was erected by Defendant Darrell Beshears, Pulaski County Judge Executive. *Id.* The courthouse displays, both in their initial and later in their modified forms, were "readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote." *McCreary I, supra* note 1, at 684; *Pulaski, supra* note 1, at 695. The schools in Harlan County School District displayed copies of a version of the Ten Commandments in their

classrooms which, like the courthouse displays, initially consisted of "framed copies of one version of the Ten Commandments which were not part of larger educational, historical or retrospective exhibits." *Harlan, supra* note 1, at 671.

After Plaintiffs filed suit, Defendants amended the respective displays "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." *McCreary I, supra* note 1, at 684. Specifically, the Courthouse displays were modified to consist of:

> (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact.

Id. (footnote omitted); *see also Pulaski, supra* note 1, at 695-96. The School Board display was modified to include those documents included in the modified courthouse displays, along with the addition of "a recently enacted

Kentucky statute, K.R.S. 158.195, which the defendants allege permits the posting of the Ten Commandments; and ...a Harlan County School Board resolution permitting the posting of the Ten Commandments." *Harlan, supra* note 1, at 672. Also common to all three modified displays was the fact that while some of the added documents were "displayed in their entirety, the defendants [] excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text." *McCreary I, supra* note 1, at 684; *Pulaski, supra* note 1, at 696; *Harlan, supra* note 1, at 672.

Despite the modifications, Plaintiffs sought a preliminary injunction from the district court to enjoin Defendants from displaying the modified exhibits, and the district court granted the preliminary injunction as to all three displays. *See McCreary I, supra* note 1, at 691. The district court found that "the amended displays failed the 'purpose' and 'effect' prongs of the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that they lacked a secular purpose and had the effect of endorsing religion." *McCreary II, supra* note 1, at 846 (footnotes omitted). The court ordered that the displays be removed "immediately" and further ordered that "similar displays" could not be erected in the future. *McCreary I, supra* note 1, at 691.

Defendants then posted a third version of the displays, presuming that the modified displays were in conformity with the law as set forth in the district court's opinions. The new courthouse displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten

Commandments[5], Lady Justice and a one-page prefatory

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[5] This version of the Ten Commandments reads as follows:

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.

Remember the sabbath day, to keep it holy.

Honour thy father and mother: that thy days may be long upon the land which the LORD thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neigbour.

Thou shalt not covet thy neighbour's house, thou

document entitled "The Foundations of American Law and Government Display." (J.A. 161-74.) The prefatory description states that the "display contains documents that played a significant role in the foundation of our system of law and government." (J.A. at 161.) With regard to the Ten Commandments, the prefatory description states:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Id. There is no other discussion of the Ten Commandments and how it purportedly relates to any of the other documents

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> shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's.
>
> Exodus 20: 3-17
>
> King James Version

(J.A. 169.)

in the display.

The new School Board displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, an excerpt of the Congressional Record containing the Ten Commandments,[6] Kentucky Statute § 158.195 regarding the

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[6] The Ten Commandments are included in a statement of Representative Philip M. Crane of Illinois in which he discusses a Joint Resolution authorizing then-President Reagan to declare 1983 to be the "Year of the Bible." *See* (J.A. 208.) (statement of Rep. Crane; quoting H.J. Res. 487, 98th Cong. (1983)). Representative Crane's version of the Ten Commandments reads:

> 1. I am the Lord thy God, thou shalt have no other gods before me.
>
> 2. Thou shalt not make unto thee any graven image.
>
> 3. Thou shalt not take the name of the Lord thy God in vain.
>
> 4. Remember the Sabbath day to keep it holy.
>
> 5. Honor thy father and mother.
>
> 6. Thou shalt not kill.
>
> 7. Thou shalt not commit adultery.
>
> 8. Thou shalt not steal.

posting of historical displays and a School Board Resolution ("the Resolution"). (J.A. at 198-208.) The Resolution stated, in part:

> We believe these ... documents positively contribute to the educational foundations and moral character of students in our schools. ... [I]t is our opinion that these ... documents, taken as a whole, are valuable examples of documents that may instill qualities desirable of the students in our schools, and have had particular historical significance in the development of this country.

(J.A. at 198.) The Resolution also contained a procedure that would permit any person to request the posting of other historical documents with the permission of the Harlan County Board of Education. (J.A. at 198-99.)

The district court, after recognizing the Supreme Court's approval of "two constitutionally permissible uses of the Ten Commandments within the public arena," found that the new displays were "clearly outside the bounds of these permissible uses and [were] violative of the Establishment Clause." *McCreary II, supra* note 1, at 852-53 (citing *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Stone v. Graham*, 449 U.S. 39 (1980)). The district court thus enjoined

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9. Thou shalt not bear false witness.

10. Thou shalt not covet.

Id.

Defendants from continuing with the new displays and ordered all three to be removed immediately from their respective locations. *McCreary II, supra* note 1, at 853.

II.

DISCUSSION

A. Standard of Review

A preliminary injunction is an extraordinary measure that has been characterized as "one of the most drastic tools in the arsenal of judicial remedies." *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986) (citation omitted); *see also Detroit Newspaper Publishers. Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972) (emphasizing that a preliminary injunction is the strong arm of equity which should not be extended to cases which are doubtful or do not come within well-established principles of law). This Court reviews the district court's decision to grant a preliminary injunction for an abuse of discretion while giving great deference to the district court's determination; however, this Court's deference to the district court is not absolute. *Mascio v. Pub. Employees Ret. Sys.*, 160 F.3d 310, 312-13 (6th Cir. 1998). The injunction will be disturbed if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. *See Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *See United States v. United States Gypsum*,

Co., 333 U.S. 364, 395 (1948).

B. Analysis

In the exercise of its discretion with respect to a motion for preliminary injunction,

> a district court must give consideration to four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998).

Mascio , 160 F.3d at 312-13. Federal Rule of Civil Procedure 52(c) "requires a district court to make specific findings concerning each of these four factors, unless fewer are dispositive of the issue." *See In re DeLorean Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985).

In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Supreme Court held that when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. In other words, the first factor of the four-factor preliminary injunction inquiry—whether the plaintiff shows a substantial likelihood of succeeding on the merits—should be addressed first insofar as a successful showing on the first factor mandates a successful showing on the second

factor—whether the plaintiff will suffer irreparable harm. *See id.*; *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (finding that "[w]hen a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

1. Strong Likelihood of Success on the Merits

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I. This clause is made applicable to the states through the Fourteenth Amendment. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). As the Supreme Court has recognized, "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593-94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

While sitting en banc, this Court recently observed that although individual Supreme Court justices have expressed reservations regarding the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) for determining whether a particular government action violates the Establishment Clause, *see Am. Civil Liberties Union of Ohio v. Capital Square Review & Advisory Bd.*, 243 F.3d 289, 306 & n.15 (6th Cir. 2001) (en banc) (collecting cases), this Court, as an intermediate federal court, is bound to follow the *Lemon* test until the Supreme Court explicitly overrules or abandons it. *Adland v. Russ*, 307

F.3d 471, 479 (6th Cir. 2002) (citing *Grutter v. Bollinger*, 288 F.3d 732, 743 (6th Cir. 2002)).

The *Lemon* test, as originally formulated, required reviewing courts to consider whether (1) the government activity in question has a secular purpose; (2) whether the activity's primary effect advances or inhibits religion; and (3) whether the government activity fosters an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. Although this remains the original formulation of the *Lemon* test, this Court has recognized in recent years that the Supreme Court has applied what is known as the "endorsement" test, which looks to whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government. *See Adland*, 307 F.3d at 479 (citing *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999) (collecting cases) and *Hawley v. City of Cleveland*, 24 F.3d 814, 822 (6th Cir. 1994)). Accordingly, this Court has held that the endorsement test "should be treated 'as a refinement of the second *Lemon* prong.'" *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 929 (6th Cir. 2002) (quoting *Adland*, 307 F.3d at 479). If a plaintiff establishes a violation of any prong of the *Lemon* test, then the government action is unconstitutional. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

a. "Purpose" Prong of the Lemon Test

Although a government's stated purposes for a challenged action are to be given some deference, it remains the task of the reviewing court to "distinguis[h] a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). Specifically, it is up to this Court to

determine whether Defendants' inclusion of the Ten Commandments in the displays was a "purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." *Lynch*, 465 U.S. at 680. To satisfy this prong of the *Lemon* test, Plaintiffs must show that Defendants' predominate purpose for the displays was religious. *See Adland*, 307 F.3d at 480 ("Although a totally secular purpose is not required, it is clear that the secular purpose requirement is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes.") (internal quotation marks and citations omitted). *See also Stone*, 449 U.S. at 41 (examining "pre-eminent purpose for posting the Ten Commandments on schoolroom walls"); *Aguillard*, 482 U.S. at 599 (Powell , J., concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.") (citations omitted).

As noted by the district court below, Defendants herein articulated the following purposes for the latest versions of the displays:

> (1) to erect a display containing the Ten Commandments that is constitutional;
>
> (2) to demonstrate that the Ten Commandments were part of the foundation of American Law and Government;
>
> (3) [to include the Ten Commandments] as part of the display for their significance in providing "the moral background of the Declaration of Independence and the foundation of our legal tradition;"

> (4) to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; and
>
> (5) [as stated by the Harlan County School Board] to create a limited public forum on designated walls within the school district for the purpose of posting historical documents which played a significant role in the development, origins or foundations of American or Kentucky law. . . .

McCreary II, supra note 1, at 848 (citations to record and footnotes omitted). The district court found that the first three purposes were, "on their face, religious in nature and therefore impermissible," and that "the history of the display belies the secular intentions of the other two." *Id.* at 848-49. We agree with the district court's ultimate conclusion that the predominate purpose of the displays was religious. We do take issue, however, with some of the district court's reasoning underpinning that conclusion.

The district court reasoned that the first three articulated purposes were "facially" unconstitutional under the Supreme Court's holding in *Stone v. Graham*, inasmuch as "that case established that a state's desire to proclaim the Ten Commandments' foundational value for American law and government is a religious, rather than secular, purpose." *McCreary II, supra* note 1, at 849. The court went on to note that in *Stone*, the Commonwealth of Kentucky sought to post the Ten Commandments along with the following notation: "'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of

Western Civilization and the Common Law of the United States.'" *Id.* (quoting *Stone*, 449 U.S. at 41). The court opined that this "putatively secular purpose" in Stone was rejected by the Supreme Court, and "is fundamentally the same as the defendants' first three articulated purposes" in the matter at hand. *Id.*

This Court disagrees. On its face, the first articulated purpose – to erect a constitutional display of the Ten Commandments – has nothing to do with the state's desire to proclaim the Ten Commandments' foundational contribution to American law and government. Rather, the facial purpose is simply to comport governmental conduct (i.e., the displays) with the law. Nevertheless, the first statement of purpose does not satisfy Defendants' burden of articulating a secular purpose for the displays, because this statement merely begs the ultimate legal question of whether Defendants' conduct is constitutional. This avowed purpose fails to shed any light on Defendants' motivation for creating the displays; at most, this purpose explains certain alterations Defendants made to the displays, but not the *raison d'etre* of the displays.[7] Accordingly, the first stated purpose does not constitute a secular purpose as a matter of law. *See Adland*, 307 F.3d at 482 (finding that government had failed to articulate a secular explanation for Ten Commandments display where "its asserted secular justification is intended merely to avoid Establishment Clause liability rather than to actually further a legitimate secular purpose"); *Books v. City of Elkhart, Ind.*,

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[7] The first stated purpose might not be question-begging if Defendants had created the displays in the context of a legal discussion in order to illustrate the constitutional limits of religious expression by governmental entities. This is clearly not the case.

235 F.3d 292, 304 (7th Cir. 2000) ("... [W]e shall not accept a stated purpose that merely seeks to avoid a potential Establishment Clause violation.")

This Court also disagrees with the district court's pronouncement about the second and third stated purposes, based on the Supreme Court's decision in *Stone*, that "a state's desire to proclaim the Ten Commandments' foundational value for American law and government is a religious, rather than secular, purpose." *McCreary II, supra* note 1, at 849. In *Stone*, a state statute required the posting of the Ten Commandments on the wall of each public school classroom. Underneath the last Commandment appeared the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption of the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 40 n.1. The Court held that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature" because the Commandments "are undeniably a sacred text in the Jewish and Christian faiths." *Id.* at 41. The Court rejected the "supposed" secular purpose of teaching the foundational role the Ten Commandments played in our civilization and legal system because merely posting the Ten Commandments fulfilled no "educational function." *Id.* at 42. The Court further opined that the outcome of the case may have been different had the Ten Commandments been "integrated into the school curriculum ... in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* (citation omitted).

Stone established no per se rule that displaying the Ten Commandments in an educational setting is unconstitutional.

See also Aguillard, 482 U.S. at 607-08 (Powell, J., concurring) ("[I]t is worth noting that the Establishment Clause does not prohibit per se the educational use of religious documents in public school education."); *Lynch*, 465 U.S. at 678-79 ("... [A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court. ... In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed."). Moreover, contrary to the district court's conclusion, *Stone* announced no per se prohibition against displaying the Ten Commandments for the purpose of demonstrating a connection with the structure of American law or government. In fact, several courts have indicated that a display for such a purpose may be permissible. *See Aguillard*, 482 U.S. at 593-94 ("[T]he Court acknowledged in *Stone* that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.") (citing *Stone*, 449 U.S. at 42); *Books*, 235 F.3d at 302 ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.") Similarly, it is conceivable that the Ten Commandments could be incorporated into a comparative religion course or a study of "the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government." *Aguillard*, 482 U.S. at 606-07 (Powell, J., concurring) (discussing the Bible generally).

To comply with *Stone*, however, a purported historical display must present the Ten Commandments objectively and

integrate them with a secular message. When such a display consists almost entirely of reading material posted in a public school, the most logical way of achieving this goal is by integrating the Ten Commandments with a secular curriculum, such as through the objective study of history, ethics or comparative religion. *See Stone*, 449 U.S. at 42; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("... [S]tudy of the Bible or of religion, when presented objectively as part of a secular program of education, may ... be effected consistently with the First Amendment."). Several factors are relevant when assessing whether the Ten Commandments have been presented objectively and integrated with a secular message: the content of the displays, the physical setting in which the Ten Commandments are displayed and any changes that Defendants have made to the displays since their inception. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 315 (holding that school's original policy on student-led prayer, which "unquestionably violated the Establishment Clause," was relevant to determining constitutionality of modified policy because the Court's inquiry "not only can, but must, include an examination of the circumstances surrounding its enactment"); *Adland*, 307 F.3d at 481 (in assessing state's avowed secular purpose in displaying Ten Commandments monument, Court looked to linguistic content of the statute authorizing the display and the intended physical context of the display).

The animating principle of *Stone* applies equally in a courthouse setting: the government must present the Ten Commandments objectively and must integrate them with a secular message. The government achieves this goal by ensuring that the symbols, pictures and/or words in the display share a common secular theme or subject matter. *See*

Adland, 307 F.3d at 481 (applying *Stone* to display of Ten Commandments on State's capitol grounds; expressing approval of the frieze on the wall of the Supreme Court, which depicts Moses carrying the Ten Commandments alongside Confucius, Mohammed, Caesar Augustus, William Blackstone, Napoleon Bonaparte and John Marshall because it does not convey the message that the Ten Commandments are the only precedent legal code of the State) (citing *Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part) (noting that Supreme Court's friezes convey a message of "respect not for great proselytizers but for great lawgivers")). Accordingly, a court examines the same factors (content, context and the evolution of the displays) to assess the nature of the governmental purpose, regardless of whether the display is in a school building or a courthouse.

The district court failed to apply these legal standards to Defendants' second and third articulated purposes, dismissing them without sufficient analysis. Nevertheless, as discussed below, the undisputed evidence in the record concerning the content and context of the displays, as well as the evolution of the displays, demonstrates that the district court did not clearly err in finding that Defendants' actual purposes were religious. Further, although the district court's legal analysis of Defendants' fourth and fifth articulated purposes was more substantive, it, too, was incomplete. Again, however, any flaws in the district court's reasoning were not outcome-determinative because the displays' content, particularly when viewed in light of Defendants' past attempts to display the Ten Commandments in a blatantly religious manner, showed that Defendants' predominate purpose for the displays was religious.

i. Content of the displays

a) School displays

The School Board's display of, *inter alia*, the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto and the Preamble to the Kentucky Constitution was accompanied by a School Board Resolution ("the Resolution"), the only document that purported to explain the significance of the documents. The Resolution stated, in part:

> We believe these ... documents positively contribute to the educational foundations and moral character of students in our schools. ... [I]t is our opinion that these ... documents, taken as a whole, are valuable examples of documents that may instill qualities desirable of the students in our schools, and have had particular historical significance in the development of this country.

The Resolution provided the sole source of commentary about the documents in the display.

Even a generous reading of the Resolution reveals that the Ten Commandments are not integrated with a secular study of American law or government. The Resolution merely asserts, without further elaboration, the School Board's "belie[f]" and "opinion" that the documents, including the Ten Commandments, have educational and moral value, as well as historical significance. It is difficult to determine what subject, if any, the display even purports to study.

Moreover, the Resolution in no way connects the Ten Commandments with the other historical documents. The likely explanation for this phenomenon is that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths," *Stone*, 449 U.S. at 41, and the other historical documents are not. As the Supreme Court has observed, "the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 42 (citing Exodus 20: 1-11; Deuteronomy 5: 6-15). None of the other historical documents concern the religious duties of those who believe in God. Nor do these documents discuss the Ten Commandments' requirement to honor parents or the prohibitions against killing, committing adultery, stealing, bearing false witness and coveting.

The Ten Commandments themselves are contained in an excerpt from the Congressional Record, which reprints a Joint Resolution of Congress declaring 1983 to be "Year of the Bible." (J.A. 208.) The fact that the Ten Commandments appear in a historical governmental publication, such as the Congressional Record, however, does not "secularize" the Ten Commandments. Rather, the question is whether the language of the Congressional Record excerpt integrates the Ten Commandments with an objective discussion of a secular subject matter. It clearly does not. The excerpt, like the School Board's Resolution, asserts an opinion (that of a Representative) that "it would serve an educational purpose for our citizens to become familiar with the important role which the Bible and Ten Commandments have played in molding our American traditions and laws." (J.A. 208.) The excerpt, however, never explains the connection between the

Ten Commandments and American traditions. The Joint Resolution itself makes assertions about the role of the Bible in forming the United States and inspiring the Declaration of Independence and the Constitution of the United States. It then concludes with the following statements:

> Whereas the history of our Nation clearly illustrates the value of voluntarily applying the teachings of the Scriptures in the lives of individuals, families, and societies;
>
> ...
>
> Whereas that renewing our knowledge of and faith in God through Holy Scriptures can strengthen us as a Nation and a people; Now, therefore, be it
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized and requested to designate 1983 as a national "Year of the Bible" in recognition of both the formative influehce the Bible has been for our nation, and our national need to study and apply the teaching of the Holy Scriptures."

(J.A. 208.) In short, Defendants' public school displays of the Ten Commandments are contained within a text that exhorts Americans to acknowledge the Bible as "the Word of God" and to apply the teachings of the Bible to their lives. The message is patently religious and in no way resembles an objective study of the role that the Ten Commandments, or even the Bible generally, played in the foundation of the

American government.

b) Courthouse displays

The courthouse displays of the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments and Lady Justice were preceded by a one-page prefatory description of the documents entitled "The Foundations of American Law and Government Display." The prefatory description of the Ten Commandments is limited to the following:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Although a bit different in form from the school displays, the courthouse displays of the Ten Commandments suffer from the same fundamental flaw – the lack of a demonstrated analytical or historical connection with the other documents.

As noted, the prefatory document asserts a connection between the Ten Commandments and "the formation of our

country" and "our legal tradition." To support this thesis, the preface cites to the "clear[]" influence that the Ten Commandments had on the Declaration of Independence. It is not facially apparent, and the preface offers no explanation, how the quotation from the Declaration is in any way connected with the Ten Commandments, which say nothing about men being created equal and with the rights to life, liberty and the pursuit of happiness. The only facial similarity between the two documents is that they both recognize the existence of a deity. The concept of a deity, however, is by no means unique to the Ten Commandments or even the Judeo-Christian tradition. Thus, this solitary similarity hardly demonstrates how the Ten Commandments in particular influenced the writing of the Declaration and, hence, the foundation of our country and legal tradition.

To buttress this alleged connection, Defendants have proffered evidence that each of the Ten Commandments was codified, to one extent or another, into the legal codes of some American Colonies, and that some of the Commandments (such as prohibitions against stealing, perjury and killing) persist to this day in American legal codes. Specifically, Defendants cite to a 1610 Virginia law requiring its leaders to give "allegiance" to God; a 1680 New Hampshire law barring idolatry; a 1610 Virginia law and a 1639 Connecticut law against taking God's name in vain; laws from the 1600's and 1700's recognizing the Sabbath; a 1642 Connecticut law exhorting children to honor their parents; laws prohibiting killing; laws from the 1600's and 1700's prohibiting adultery; laws against stealing; and anti-perjury laws that prohibit bearing "false witness." Defendants cite to no particular law that prohibits "coveting."

The problem with this evidence and Defendants' accompanying argument is two-fold. One, the evidence does not appear in the actual display of the Ten Commandments, so an observer would not actually be made aware of these facts – a phenomenon equally relevant to the discussion of the "endorsement" issue below. Two, even assuming that the Ten Commandments are the sole or primary source of some laws codified by certain Colonies and State legislatures, this "fact" is irrelevant to the fundamental assertion in the display that the Ten Commandments clearly influenced the creation of the Declaration of the Independence and, thus, the formation of our country and legal tradition. The dissent expends a considerable amount of effort discussing "the influence of religion upon American law." We have no reason to doubt the existence of such an influence, but that is not the issue in this case. Even granting that religion in general influenced the development of our country and our legal traditions, we cannot simply take judicial notice of the very different and very specific claim that the Ten Commandments profoundly influenced the drafting of the Declaration of Independence. An assertion of such a connection is not evidence of such a connection. Thus, the dissent's discussion, like Defendants' evidence, simply misses the mark.

The Court finds it significant that neither Defendants nor the dissent have attempted to buttress the historical claim that the prefatory document makes about the Ten Commandments' foundational role in the drafting of the Declaration of Independence. To be sure, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Abington Sch. Dist.*, 374

U.S. at 213. There is by no means a consensus, however, that the source of Thomas Jefferson's belief in divinely-bestowed, unalienable rights, to the extent this belief inspired the writing of the Declaration,[8] was the Ten Commandments or even the Bible. One historian has noted that Jefferson believed in the "watchmaker God of deism ... who established the laws of nature in the material universe at the time of creation and then left it alone." Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy and Theology* 24 (1998). He therefore posits that the "Nature's God" Jefferson referenced in the Declaration was not the God of the Bible (and thus the Ten Commandments), but the God of deism.[9]

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[8] The Continental Congress appointed a committee of five to decide who would write the Declaration. Pauline Maier, *American Scripture* 99 (1998). The committee assigned Jefferson the task of drafting the document. *Id.* at 100. The draft was revised based on comments from Benjamin Franklin and John Adams. *Id.* at 100-02. After incorporating their comments, Jefferson reported the revised draft to the Congress. *Id.* at 100. Once in Congress, the Declaration was revised by other men. *Id.* at 105.

[9] *Id.* at 19 ("Jefferson's heterodox religious views were founded on an Enlightenment outlook in general and the writings of Henry St. John, Lord Viscount Bolingbroke, in particular. It is the God of his heterodoxy that appears in the Declaration of Independence rather than the God of the Bible."); *id.* at 38 ("Jefferson's God of the Declaration is ... antithetical to any God who would manifest partiality by choosing one people or nation over others, as did the God of the Old Testament."). Jayne also quotes a letter written by Jefferson in which he expressed doubt about the origin and authenticity of the Ten Commandments. *Id.* at 34 ("'[T]he whole history of these books [containing the Ten Commandments] is so defective and doubtful, that it seems vain to

Further, several historians have concluded that Jefferson was most inspired by contemporaneous political writings as well as the musings of European philosophers and writers.[10]

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attempt minute inquiry into it; and such tricks have been played with their text, and with the other texts of other books relating to them, that we have a right from that cause to entertain much doubt what parts of them are genuine.'") (quoting January 24, 1824, letter from Jefferson to John Adams).

[10] *See* David McCullough, *John Adams* 121 (2001) (noting that Jefferson borrowed from his previous writings, as well as the writings of George Mason and Pennsylvania delegate James Wilson; further noting that Jefferson was "drawing on long familiarity with the seminal works of the English and Scottish writers John Locke, David Hume, Francis Hutcheson, and Henry St. John Bolingbroke, or such English poets as Defoe"); Maier, *supra* note 5, at 104 (noting evidence that Jefferson hastily produced a draft of the Declaration in a day or two and adapted two texts to complete a draft in this short time-frame: the preamble to the Virginia Constitution, "which was itself based on the English Declaration of Rights," and a preliminary version of the Virginia Declaration of Rights that had been drafted by George Mason); *id.* at 136 (noting that the Declaration's reference to "the laws of nature and nature's god" parallels the laws applicable to "individuals in a state of nature, a point, incidentally, that John Locke made explicitly in his Second Treatise of Government"); Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* 79 (1922) (noting that with respect to "the political philosophy of Nature and natural rights" referenced in the Declaration that the "lineage is direct: Jefferson copied Locke"); Jayne, *supra*, at 44 (noting "the similarity of many of the provisions of [Locke's] Second Treatise with those of the Declaration, which clearly shows that Jefferson not only had

Defendants have not cited the Court to a single historical source in support of the proposition that the Ten Commandments inspired the drafting of the Declaration of Independence.

Although this Court has neither the ability nor the authority to determine the "correct" view of American history, it is our role to recognize that (a) Defendants' displays provided the viewer with no analytical or historical connection between the Ten Commandments and the other historical documents; and (b) Defendants have made no attempt in this litigation to support the displays' historical assertions with relevant and credible evidence. The Court's reference to historical sources is intended merely to illuminate these fundamental deficiencies in Defendants' argument and to suggest that an objective presentation of the Ten Commandments would at least take into account the abundant historical evidence regarding the sources that influenced the drafters of the Declaration of Independence.[11] Contrary to the dissent's assertion, we do not "envision a display that contains a recounting of the history of the nation's founding [or] a summary of American constitutional law and history." We do envision, however, a display that does not go out of its way to stress the proposition that the Ten Commandments formed the foundation of the Declaration of Independence while utterly ignoring (and implicitly denying) all other influences. It is up to Defendants to determine the most

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extensive knowledge of Locke's work but put it to use in drafting the Declaration").

[11] *See, e.g.*, note 7, *supra*.

efficient manner of integrating the Ten Commandments with an objective historical display.

c) Summary

In sum, the very text in which the Ten Commandments are contained in the schoolhouse displays manifests a patently religious purpose. Defendants' courthouse displays also manifest a religious purpose because they utterly fail to integrate the Ten Commandments with a secular subject matter. When distilled to their essence, the courthouse displays demonstrate that Defendants intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition. The Supreme Court has held, however, that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment" when no effort has been made to integrate the Ten Commandments with a discussion or display of a secular subject matter. *Stone*, 449 U.S. at 41. Since Defendants' displays make no such effort, the district court correctly concluded that Defendants' primary purpose was religious.

This Court's decision in *Adland*, which was rendered after the district court's decision, further supports its conclusion. In *Adland*, a Kentucky law directed the Department for Facilities Management to "relocate the monument inscribed with the Ten Commandments which was displayed on the Capital grounds for nearly three decades to a permanent site on the Capital grounds near Kentucky's floral clock to be made part of a historical and cultural display including the display of [the law] to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." *Id.* at 474-75. In finding that the stated purpose of the law, "to remind Kentuckians of

the Biblical foundations of the laws of the Commonwealth," failed the secular purpose prong of the *Lemon* test, this Court concluded that "this avowed secular purpose, which is essentially the same secular purpose that the Commonwealth of Kentucky put forth in *Stone*, is insufficient, standing alone, to satisfy the secular purpose requirement." *Id.* at 481 (citing *Stone*, 449 U.S. at 42). The Court further opined:

> While the Commonwealth need not commemorate every arguable historical influence on the laws of the Commonwealth or keep current with the views of every scholar to ensure compliance with the Establishment Clause, we cannot ignore its decision to focus only on the "Biblical foundations" of the law. ... [I]n addressing the Commonwealth's avowed secular purpose for displaying an overtly religious symbol such as the Ten Commandments, we cannot ignore the Commonwealth's adoption of a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences.

Id. at 481-82 (citation omitted).

Like the display in *Adland*, Defendants' courthouse displays assert that the Ten Commandments provide "*the* moral background of the Declaration of Independence and *the* foundation of our legal tradition." (J.A. 161) (emphases added). The displays emphasize a single religious influence, with no mention of any other religious or secular influences. This fact confirms the rectitude of the district court's conclusion that Defendants' purposes were religious.

ii. Context of the displays

The "intended physical context" of the Ten Commandment displays also is relevant to a determination of the primary purpose behind them. *Adland*, 307 F.3d at 481. Here, the displays did not provide undue physical emphasis to the Ten Commandments. In both the school and courthouse displays, the Ten Commandments appeared on a single piece of paper, the same size as that containing the secular documents. With that said, sandwiching the Ten Commandments between secular texts does not necessitate a finding that the primary purpose of the displays is secular. *See Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001) ("[T]he display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting the monument is primarily secular."). Thus, where the content of the displays otherwise indicates a predominate religious purpose, the fact that the Ten Commandments are not physically prominent is not dispositive.

A finding of religious purpose is militated by the blatantly religious content of the displays. The displays do not present a "passive symbol" of religion like a crèche, which, when accompanied by secular reminders of the holiday season, has come to be associated more with the public celebration of Christmas, rather than that holiday's religious origins. *Lynch*, 465 U.S. at 686. Instead, the Ten Commandments are an active symbol of religion because they "concern[] the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Stone*, 449 U.S. at 42 (Biblical citations omitted). The Ten Commandments "are undeniably

a sacred text in the Jewish and Christian faiths," *id.* at 41, and, therefore, are "still an inherently religious text." *Indiana Civil Liberties Union*, 259 F.3d at 771. As such, Defendants had to exercise special care to present the Ten Commandments objectively and as an integral part of a non-religious message. As discussed above, Defendants failed in this endeavor.

iii. Evolution of the displays

Defendants' conduct from the time it created the Ten Commandments displays throughout the time it modified the displays is relevant to determining their primary purpose. The Supreme Court made this legal principle abundantly clear in *Santa Fe Indep. Sch., supra.* That case involved a challenge to a policy of student-led prayer at high school football games. Prior to 1995, the school district's policy authorized a student elected as "Student Chaplain" to deliver a prayer over the public address system before each game. After several students and their parents filed suit challenging the policy under the Establishment Clause, the school district adopted a different policy in August 1995. The policy, entitled "Prayer at Football Games," authorized two student elections, the first to determine whether "invocations" and "benedictions" should be delivered at games, and the second to select the spokesperson to deliver them. *Santa Fe Indep. Sch.*, 530 U.S. at 297. The policy omitted any requirement that invocations and benedictions be nonsectarian and nonproselytising, but contained a fallback provision that automatically added the provision if the preferred policy should be enjoined. *Id.* The policy was changed again in October 1995 to omit the word "prayers" from the title, and to refer to "messages" and "statements" as well as "invocations." *Id.* at 298.

In holding that the school district had run afoul of the Establishment Clause by sponsoring a religious message, the Court looked, among other things, to "the evolution of the current policy from the long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation." *Id.* at 309. The Court held that "[t]his history indicates that the District intended to preserve the practice of prayer before football games." *Id.* Later in its decision, the Court held that the school district's history of noncompliance with the Establishment Clause not only could be considered, but had to be considered, in determining whether the school district's latest iteration of the challenged policy was constitutional. As the Court stated:

> This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. . . . Our discussion in the previous sections . . . demonstrates that in this case the District's direct involvement with school prayer exceeds constitutional limits.
>
> The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is

> obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Id. at 315.

This Court similarly has held that a government's earlier policies or practices involving religious speech are relevant when determining the primary purpose behind a revised policy that ostensibly is designed to address earlier violations of the Establishment Clause. In *Adland*, this Court was faced with a Kentucky statute that compelled the location of a monument inscribed with the Ten Commandments on the grounds of the state capitol, near a floral clock. *Adland*, 307 F.3d at 474-75. The statute was silent with regard to any other contents of the display. In the course of litigation, Kentucky "clarifie[d]" that the display would consist of other "markers, signs and monuments," including a sign commemorating a Civil War event, a "Welcome to Kentucky" plaque, a prisoner of war marker and markers for other civic leaders. *Id.* at 477. The Court found Kentucky's litigation-inspired "clarification" to its Ten Commandments display, which originally consisted only of the Ten Commandments monument and a clock, to be probative of the Commonwealth's religious purpose:

> [T]he Commonwealth did not reveal the contents of this display until it was in the midst of litigation. In our view, this indicates that the other components of

> the display are an afterthought, at best, secondary in importance to the Ten Commandments, and suggests that the Commonwealth acted with a predominantly religious purpose.

Id. at 481.

Contrary to Defendants' argument, this Court's decision in *Granzeier*, *supra*, does not deem Defendants' past unconstitutional displays of the Ten Commandments irrelevant to the primary purpose behind the latest version of the displays. The issue in *Granzeier* was whether the closing of county and state courts and offices on Good Friday violated the Establishment Clause. At one point, an employee of one of the county defendants, "acting without knowledge or authorization of any defendant, made signs bearing an image of the Crucifixion and announcing that the building would be closed 'for observance of Good Friday.'" *Granzeier*, 173 F.3d at 571. When the county was sued, it removed the signs from the courthouse and put up new signs announcing that the building would be closed; at the time of the litigation, the defendants referred to the Friday before Easter as "Spring Holiday." *Id.* The plaintiffs argued that the original sign showed that the defendants intention to close for a Spring holiday on the Friday before Easter was a "sham." *Id.* at 574.

This Court rejected the plaintiffs' argument because it saw "no reason that Defendants' policy here, if otherwise constitutional, should not remain so after an unauthorized employee posted an unconstitutional sign for a few days." *Id.* (emphasis added). The sign did not permanently taint all future closings for a Spring holiday because the evidence showed that the recognition of Good Friday as a secular

Spring holiday was "otherwise constitutional."[12] Importantly, *Granzeier* did not hold that evidence of past unconstitutional conduct is never probative evidence of present unconstitutional conduct. Rather, it held that where the remaining evidence shows that the government policy is "otherwise constitutional," past unconstitutional conduct does not preclude a finding of constitutionality. This holding is consistent with the Supreme Court's direction in *Santa Fe Indep. Sch.* that courts can, and must, look to prior unconstitutional practices when determining the primary purpose behind the government's present practices.

In looking to the context and history of Defendants' Ten Commandments displays, the court below found that "the history of these displays indicates that the defendants' overall purpose is religious in nature: to display the Ten Commandments." *McCreary II, supra* note 1, at 849. The district court, therefore, held that Defendants fourth and fifth purported secular purposes (to educate citizens regarding some of the documents that played a significant role in the foundation of the American and Kentucky systems of law and government) were primarily religious. *Id.* at 850. The district court found it "significant" that Defendants' original displays, containing only the Ten Commandments, "were erected in violation of the Supreme Court's clear ruling in Stone." *Id.* at

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[12] The evidence showed that Good Friday had become a holiday with significant "secular effects" (e.g., absent school children, high traffic volume from vacationers, and low activity at public offices and courts) and, therefore, the recognition of Good Friday as a secular holiday was permissible in the same way that Christmas Day and Thanksgiving are so recognized. *Id.* at 574-76.

849-50 (footnote omitted). "This defiance," according to the district court, "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint observed not only by this court, but by anyone acquainted with this litigation." *Id.* at 850 (footnote omitted). The district court's finding is consistent with the Supreme Court's decision in *Santa Fe Indep. Sch.*, which compels courts to consider the government's past violations of the Establishment Clause when evaluating its present conduct, and with this Court's *Adland* decision, which authorizes courts to rely on evidence of such prior violations as proof that subsequently-added, secular components of an otherwise-unconstitutional display are an "afterthought."

The district court further noted that Defendants' amended displays (which were the subject of the court's original preliminary injunction) "accentuated the defendants' religious purpose, rather than diminishing it, by posting the Commandments along with "specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references." *McCreary II, supra* note 1, at 850 (citing *Pulaski*, 96 F. Supp. 2d at 699). Again, the district court was correct in concluding that the evolution of Defendants' Ten Commandments displays bore directly on the primary purpose behind the ultimate versions of the displays.

Based on "the history of the government's involvement in these displays," the district court held that the final version of the displays which portrayed the Ten Commandments alongside the full text of various historical documents and was erected allegedly "to educate the citizens of McCreary and Pulaski Counties and the schoolchildren of Harlan

County regarding the history of this nation's law and government," actually was done for a non-secular purpose. *Id.* The Court agrees with the district court insofar as the history of Defendants' involvement with the displays strongly indicated that the primary purpose was religious. This Court is concerned, however, that the district court appeared to afford exclusive weight to Defendants' past conduct without addressing the specific content of the revised displays. Nevertheless, as discussed in detail above, the content of the modified displays patently evidence a religious purpose, and the district court recognized as much in its subsequent discussion of the "endorsement" prong. *See id.* at 851. Accordingly, the district court did not clearly err in finding that Defendants' fourth and fifth avowed secular purposes – to educate citizens regarding some of the documents that played a significant role in the foundation of the American and Kentucky systems of law and government – fail the first prong of the Lemon test. For the same reasons, the district court did not clearly err in finding that Defendants' first three avowed secular purposes, which specifically mention the Ten Commandments, were predominated by a religious purpose.

Although the inquiry into the constitutionality of the displays could end here, inasmuch as failure under any one of the *Lemon* prongs deems governmental action violative of the Establishment Clause, *see Edwards*, 482 U.S. at 583, we shall address the "endorsement" prong of *Lemon* because the district court addressed the second prong as well.

b. "Endorsement" Prong of the *Lemon* Test

In determining whether Defendants' displays impermissibly endorse religion, this Court must ask "whether

an objective observer, acquainted with the text, legislative history, and implementation" of the displays would view them as state endorsement of religion. *Santa Fe Indep,. Sch. Dist.*, 530 U.S. at 308 (citations omitted); *Capital Square Review & Advisory Bd.*, 243 F.3d at 302. "In making this inquiry, [this Court] do[es] not allow a state 'to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.'" *Adland*, 307 F.3d at 484 (quoting Pinette, 515 U.S. at 777). In addition, the inquiry must be viewed under the "totality of the circumstances surrounding the display." *Books*, 235 F.3d at 304. As a result, the Court must "look to both the specific content of the display and the context of its presentation." *Adland*, 307 F.3d at 484 (citing *Allegheny*, 492 U.S. at 598).

The Supreme Court decisions involving Christmas-time crèche displays demonstrate how the failure to integrate religious symbols with an overall secular theme can result in the impermissible endorsement of religion. In *Allegheny, supra*, the Court noted that "the crèche itself is capable of communicating a religious message." *Allegheny*, 492 U.S. at 598. The Court struck down a courthouse crèche display because nothing in the context of the display detracted from the crèche's religious message. *Id.* The Court distinguished the display from the one at issue in *Lynch*, *supra*, which had been composed of a "series of figures and objects, each group of which had its own focal point." *Id.* The *Lynch* display had included numerous purely secular symbols, such as a Santa Claus house, a lighted Christmas tree, a "talking" wishing well, a miniature village, a banner proclaiming "SEASONS GREETINGS," and candy-striped poles. *Lynch*, 465 U.S. at 671. In *Allegheny*, by contrast, "the crèche [stood] alone: it [was] the single element of the display" in the courthouse,

thereby sending "an unmistakable message that [the county] supports and promotes the Christian praise to God that is the crèche's religious message." *Allegheny*, 492 U.S. at 598-99. Thus, the crèche display in *Lynch* was permissible because the symbols shared a common secular link – the holiday season[13] – and the arrangement of the symbols conveyed that link to the display's observers. This secular link overcame any religious message that any one component of the display (i.e., the crèche) might otherwise have conveyed on its own.

The dissent appears to read *Lynch* and *Allegheny* to hold that a symbol which is wholly or partially religious no longer conveys its religious message when it is physically surrounded by wholly secular symbols. This overly-simplistic reading of the case law ignores the requirements that (a) the symbols be interconnected in a manner that is facially apparent to the observer and (b) the interconnection be secular in nature. For example, if Defendants in this case had substituted the Ten Commandments with a depiction of the Crucifixion or a religious sermon exhorting the citizenry to worship God and abide by the Ten Commandments, the religious messages would not have been subordinate to an overall secular theme simply because the religious document would have been surrounded by secular documents, such as the Declaration of Independence and the Magna Carta. Instead of blending in with an overall secular theme, the religious document, although physically contiguous, would have stood apart from the rest from a thematic point of view.

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[13] *Cf. Allegheny*, 492 U.S. at 596 (noting that Christmas is "a holiday with strong secular elements") (citing *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)).

As to the composition of the displays in this case, the district court opined:

> The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents. Given the religious nature of this document, placing it among these patriotic and political documents, with no other religious or moral codes of any kind, imbues it with a national significance constituting endorsement. The Ten Commandments are completely different from the remainder of the displays. The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement. . . . [T]he current set of displays conveys the counties' comment on the Ten Commandments' (and consequently, religion's) foundational value to our shared history as citizens; a reasonable person would perceive this message as endorsement.

McCreary II, supra note 1, at 851 (footnotes omitted). We agree with the district court's conclusion.

In *Books*, the Seventh Circuit held that "the placement of the American Eagle gripping the national colors at the top of the [Ten Commandments] monument hardly detracts from the message of endorsement; rather, it specifically links religion . . . and civil government." *Books*, 235 F.3d at 307. *See also Adland*, 307 F.3d at 486-87 (agreeing with the Seventh

Circuit's holding in *Books* that "the inclusion of an American eagle gripping the national colors at the top of the monument, serves to heighten the appearance of government endorsement of religion"). Here, the same can be said of Defendants' transparent attempt to "secularize" the displays by surrounding the Ten Commandments with other patriotic documents and symbols, such as the Bill of Rights and the Preamble to the Kentucky Constitution. *See Indiana Civil Liberties Union*, 259 F.3d at 773 (holding that display consisting of Bill of Rights, Preamble to Indiana Constitution and Ten Commandments would signal to the reasonable observer "that the state approved of such a link, and was sending a message of endorsement") (citing *Books*, 235 F.3d at 307).

Ultimately, the displays convey a message of religious endorsement because of the complete lack of any analytical connection between the Ten Commandments and the other patriotic documents and symbols. A reasonable observer of the displays cannot connect the Ten Commandments with a unifying historical or cultural theme that is also secular. All of the other documents relate in some fashion to Western European or American culture since 1215; several of the documents are legal in nature, one is an American symbol, one is an American slogan and one is an American song. The Ten Commandments are several thousands of years old, were not a product of European or American culture and, many believe, are the word of God. See Baruch J. Schwartz, *Ten Commandments, in The Oxford Dictionary of the Jewish Religion*, 683 (1997) (noting that in both Biblical accounts of the revelation of the Ten Commandments at Sinai, "[t]he 'Ten Words' were inscribed by God on the first set of Tablets given to Moses.") A reasonable observer would not be able to

link all of these texts to the foundation of American law and government; the displays' mere assertion of such a link does not cure the problem any more than a disclaimer stating that the Ten Commandments has been "adopt[ed] as the fundamental legal code of Western Civilization and the Common Law of the United States." *Stone*, 449 U.S. at 40 n.1 (holding that such a disclaimer is not sufficient to avoid a conflict with the First Amendment). *See also Adland*, 307 F.3d at 488 (noting that "'no sign can disclaim an overwhelming message of endorsement'") (quoting *Allegheny*, 492 U.S. at 619). Upon seeing the Ten Commandments, which sticks out in the displays like a proverbial "sore thumb," a "reasonable person will think religion, not history." *Indiana Civil Liberties Union* , 259 F.3d at 773 (holding that reasonable observer would not be able to make an analytical connection between Ten Commandments, Bill of Rights and Preamble to Indiana Constitution).

The district court further found that the location of the displays – in the McCreary and Pulaski County courthouses and Harlan County public schools – had "the effect of advancing religion." *McCreary II, supra* note 1, at 852. We agree. With regard to the school displays, it is noteworthy that the Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Aguillard*, 482 U.S. at 583-84. This is because the public schools hold a position of trust that parents condition "on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* at 584. Public school students are especially impressionable due to the coercive power that the

State exerts through mandatory attendance requirements, "and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* (footnote and citations omitted). Thus, the presence of these displays in the schools enhances the underlying message of religious endorsement contained in the displays. As the Supreme Court has commented, if such displays "are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone*, 449 U.S. at 42.

The citizenry exhibits a similar impressionability in the setting of a county courthouse, where the government carries out one of its quintessential functions – the enforcement of the civil and criminal laws. Typically, citizens are at the courthouse by necessity –whether they are on trial for a crime, have been subpoenaed as witnesses, are seeking to vindicate their civil rights, have been called to jury duty or are simply contesting parking tickets, registering to vote or renewing their driver's licenses. County courthouses also exude a coercive pressure, ranging from compulsory jury service to bench warrants to judicial decrees. Accordingly, a courthouse display of the Ten Commandments that conveys a religious message is nothing like a similar display in "a typical museum setting[;] though not neutralizing the religious content ..., [the museum setting] negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). As in *Books*, Defendants' courthouse displays posted at the seat of government, which "'is so plainly under government ownership and control' that every display on its property is marked implicitly with government approval." *Books*, 235

F.3d at 306 (quoting *Am. Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987)).

Finally, the district court found that the history of the displays bolstered the reasonable observer's perception of the state endorsement of religion inasmuch as the observer is charged with knowing the history of the respective displays, and in each case the history indicates that the displays were originally intended to enshrine the Ten Commandments; it was only upon fear of litigation that the displays were modified to include secular material in the hope of rendering the displays constitutional. *McCreary II, supra* note 1, at 852. We agree with the district in this regard as well. *See Santa Fe Indep,. Sch. Dist.*, 530 U.S. at 308 (crediting the objective observer with being "acquainted with the text, legislative history, and implementation" of the displays). As a result, this Court concludes that the district court did not clearly err in finding that the displays have the impermissible effect of endorsing religion.[14]

2. Other Preliminary Injunction Factors

As Plaintiffs note in their brief, Defendants do not address the other three preliminary injunction factors on appeal and, therefore, have abandoned any argument as to these factors. However, because Plaintiffs have demonstrated a likelihood of succeeding on the merits of their Establishment Clause

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[14] The district court did not address the third *Lemon* factor and, therefore, neither shall we. As stated, failure under any one of the *Lemon* factors invalidates the challenged governmental action, and thus the third factor need not be addressed. *See Edwards*, 482 U.S. at 583.

claim, the other three preliminary factors follow in favor of granting the injunction. *See Connection Distrib. Co.*, 154 F.3d at 288 (finding that "[w]hen a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

III.

CONCLUSION

For the above-stated reasons, the district court's order requiring the removal of the displays from the McCreary and Pulaski County courthouses and from the Harlan County schools is AFFIRMED.

CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring. The district court's decision to grant plaintiffs-appellees' motion for a supplemental preliminary injunction enjoining the continued exhibition of the current displays was proper. With respect to the "secular purpose" prong of the test used to determine the constitutionality of the current displays, as set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the majority opinion appropriately follows controlling precedent, and I generally agree with its

application of the law to the facts of this case.

In light of the inherently religious nature of the Ten Commandments, defendants-appellants' failure to articulate a facially secular purpose until after litigation had commenced, the "overtly religious" quality of the second display, *Am. Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 145 F.Supp.2d 845, 850 n.19 (E.D. Ky. 2001), the absence of any evidence in the record indicating that the Ten Commandments have been or will be integrated into the school curriculum as part of an appropriate program of study, the absence of any discussion integrating the Ten Commandments into a secular subject matter other than a conclusory assertion about the Declaration of Independence, and the emphasis on the Ten Commandments as the only religious text in the displays, plaintiffs-appellees have shown a strong or substantial likelihood of success on the merits of their claim that the displays lack a secular purpose. I therefore concur in the result. I write separately, however, to emphasize that, as the majority opinion notes, "the inquiry into the constitutionality of the displays could end here, inasmuch as failure under any one of the Lemon prongs deems governmental action violative of the Establishment Clause." Consequently, I express no opinion as to whether the displays violate the "effect/endorsement" prong of the Lemon test.

Finally, I offer two further observations relating to the dissenting opinion. First, the dissent concludes that the majority opinion questions a link between religion and our laws and government. In my view, the majority opinion says nothing whatsoever about this topic. Its subject is the application of the *Lemon* test to this particular case, and the only discussion to which the dissent could possibly refer in

reaching this conclusion concerns defendants' failure to include in the displays any support for their conclusory assertion about the relationship between the Ten Commandments and the Declaration of Independence.

Second, the dissent seeks to characterize the majority opinion's descriptions of the facts on which its conclusion rests as statements of broad rules. For example, the dissent says that the majority opinion creates rules that the government may display the Ten Commandments in a public building only if they are integrated into a secular curriculum and that any display must include a narration of proof of the relationship between religion and the foundation of American law. In my view, this reading of the majority opinion is unjustified. Rather, the majority considers the lack of integration of the displays into a secular curriculum and the lack of recited proof of a relationship between the Ten Commandments and the Declaration of Independence as factors that support a lack of secular purpose in this case and considers these factors, along with other evidence in this record, in reaching its result.

DISSENT

RYAN, Circuit Judge, dissenting. The majority holds that the displays mounted on the walls of the county courthouses in McCreary and Pulaski counties and in the school buildings

in Harlan County, Kentucky, offend the Establishment Clause of the First Amendment of the United States Constitution, and it affirms the district court's order that the displays be removed. I disagree and, with respect, must dissent.

The defendants' displays comport with the requirements of the Constitution in every respect, as is clearly indicated by the Supreme Court's two landmark cases permitting the use of religious symbols on public property: *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Rather than address these authorities in a meaningful fashion, the majority conjures a rule from the case of *Stone v. Graham*, 449 U.S. 39 (1980), a two-page, per curiam decision of the Court that preceded both *Lynch* and *Allegheny*, that was decided without the benefit of oral argument or briefs on the merits, and that bears no factual similarity to the case before us.

With one exception, the majority's analysis fails to properly apply the relevant Supreme Court precedent to the facts of the case before us. Inasmuch as my colleagues have expressed their disagreement with the reasoning that led the district court to conclude that the displays are unconstitutional, there is no need to point out why that is an eminently correct judgment. Nevertheless, having rejected much of the district court's analysis, the majority now affirms the judgment of that court by employing a wholly independent rationale that was not developed below and not presented to this court for review.

I.

As the majority has correctly said, the controlling law in

this case is the three-part "*Lemon* test" found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as refashioned, it should be added, in *Lynch v. Donnelly*, 465 U.S. 668, and *County of Allegheny v. ACLU*, 492 U.S. 573. The *Lemon* test has proved difficult to apply in many Establishment Clause cases because its three elements are frequently ill-suited to ever more imaginative Establishment Clause challenges. Indeed, the Supreme Court has cautioned against mechanically applying the test to every Establishment Clause case, *Lynch*, 465 U.S. at 679, and has variously criticized, modified, and even ignored it. *See, e.g., Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (citing cases).

Of the current members of the Supreme Court, six have criticized the *Lemon* test. For example, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), then-Justice Rehnquist stated:

> [T]he Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service.

Id. at 110 (Rehnquist, J., dissenting). Justice O'Connor once called the analysis under the Lemon test "problematic" and warned that there are "certain difficulties inherent in the Court's use of the test." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in the judgment). Justice Stevens has lamented "the sisyphean task of trying to patch together the 'blurred, indistinct, and

variable barrier' described in *Lemon*." *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). Also registering his dissatisfaction with *Lemon*, Justice Kennedy stated:

> I . . . do not wish to be seen as advocating, let alone adopting, [the *Lemon*] test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. Our cases often question its utility in providing concrete answers to Establishment Clause questions, calling it but a helpful signpos[t] or guidelin[e], to assist our deliberations rather than a comprehensive test. Substantial revision of our Establishment Clause doctrine may be in order.

Allegheny, 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part) (internal quotation marks and citations omitted). Finally, Justice Thomas joined the refrain when he signed on to a dissent written by Justice Scalia, the Court's severest critic of *Lemon*, who had this to say about the much-maligned test:

> Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, which has received well-earned criticism from many Members of this Court.

Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., joined by, *inter alios*, Thomas, J., dissenting) (citation omitted).

The Court has also modified the *Lemon* test by adopting Justice O'Connor's "endorsement test" from *Lynch*:

> [Justice O'Connor's] concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display."

Allegheny, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). The test has been further modified by "fold[ing] the entanglement inquiry into the primary effect inquiry." *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring).

In some cases, the Supreme Court has simply ignored the *Lemon* test. In *Larson v. Valente*, 456 U.S. 228 (1982), the Court, holding that Minnesota's charitable solicitation statute violated the Establishment Clause, stated that the "application of the *Lemon* tests is not necessary to the disposition of the case before us." *Id.* at 252. Chief Justice Warren Burger, himself the author of *Lemon*, also declined to apply the test in an Establishment Clause challenge to Nebraska's practice of paying a chaplain to offer prayers at the opening of the state's legislative sessions. *See Marsh v. Chambers*, 463 U.S. 783 (1983).

Not surprisingly, the Court has consistently emphasized that the *Lemon* test is not the *sine qua non* of Establishment Clause jurisprudence. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court stated that the *Lemon* test "provides 'no

more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Id.* at 394 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)). And in *Lynch*, citing cases in which it did not utilize the Lemon test at all, the Court stated: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." 465 U.S. at 679. In the *Lemon* case itself, the Supreme Court grappled with the question whether statutes in Pennsylvania and Rhode Island that authorized limited state financial aid to church-related schools violated the Establishment Clause. The Court said they did, because neither statute could pass the new test Chief Justice Warren Burger conjured, mid-opinion, which provides:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster an excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13 (internal quotation marks and citations omitted).

Over the years, the Supreme Court has broadened the test to apply not only to legislative enactments, but to any government action. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court applied the test to a university policy that excluded religious groups from a public forum. After experiencing considerable difficulty applying the test to various Establishment Clause challenges, especially its second part which proscribes government action whose primary effect either advances or inhibits religion, the Court modified that part of the test to prohibit government action

that has the principal or primary effect of "endorsing" religion. *Allegheny*, 492 U.S. at 595 (citing *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring)).

While judges, lawyers, and constitutional law scholars continue to criticize *Lemon*, and repeatedly urge the Supreme Court to fashion a new, more workable test for determining whether a unit of government has made a "law respecting an establishment of religion," U.S. Const. amend. I, we (the lower federal courts) are stuck with the three-part Lemon test, and we must apply it in this case.

Having done so, I conclude that the three displays the plaintiffs have challenged, easily and obviously pass the Lemon test, and that, perforce, my colleagues' conclusion to the contrary is mistaken.

II.

The majority opinion has partially misstated the proper standard of review in this case. It is certainly true that we review a district court's decision to grant a preliminary injunction for an abuse of discretion. *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030 (6th Cir. 1995). However, in determining whether the district court abused its discretion, we review its findings of fact for clear error and its legal conclusions de novo. *Id.* Moreover, we will overturn a district court's decision to grant a preliminary injunction "if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n,* 110 F.3d 318, 322 (6th Cir.

1997). In this case, because the district court based its decision to grant the injunction on the legal conclusion that the displays failed the purpose and effect prongs of the Lemon test, that conclusion should properly be reviewed de novo.

III.

What the district court and my colleagues have held unconstitutional is an arrangement of ten framed documents on the courthouse lobby walls in McCreary and Pulaski counties and in the Harlan County school buildings.

The courthouse displays consist of the following documents:

1. The Star Spangled Banner;

2. The Declaration of Independence;

3. The Mayflower Compact;

4. The Bill of Rights;

5. The Magna Carta;

6. The National Motto;

7. The Preamble to the Kentucky Constitution;

8. The Ten Commandments;

9. A printed figure of the Lady Justice; and

10. An explanatory sign identifying the foregoing documents and stating that the entire display is of "documents that played a significant role in the foundation of our system of law and government."

In addition, the courthouse displays are prominently identified as: "Foundations of American Law and Government Display."

The Harlan County School Board display is essentially identical to the McCreary and Pulaski courthouse displays, except that it is not identified as the "Foundations of American Law and Government Display," and the Lady Justice document and the explanatory sign are omitted. In their places are the text of Kentucky Revised Statute § 158.195, authorizing the posting of historical displays, and a lengthy Harlan County School Board resolution, stating, among other things, that the "many documents [comprising the display], taken as a whole, have special historical significance to our community, our country, and our country's history." No one of the framed documents in any of the displays has, by its size or location in the arrangement, any greater prominence than any other.

The defendants claim their purposes were to assemble and post in the courthouse and school district buildings, an array of historical documents that, taken together, have the educational and patriotic value of illustrating some of the ideas and influences that "were part of the foundation of American Law and Government" and "played a significant role in the development, origins or foundations of American

or Kentucky law." *ACLU v. McCreary County* (*McCreary II*), 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001) (internal quotation marks and citations omitted). They argue that these purposes are entirely secular.

The district court correctly summarized the defendants' secular purposes as follows:

1.To erect a display containing the Ten Commandments that is constitutional;

2.To demonstrate that the Ten Commandments are part of the foundation of American law and government;

3.To include the Ten Commandments as part of the display for their significance in providing the moral background of the Declaration of Independence and the foundation of our legal tradition;

4.To educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; and

5.As designated by the Harlan School Board, to create a limited public forum on designated walls within the school district for the purpose of posting historical documents that played a significant role in the development, origins, or foundations of American and Kentucky law.

See id.

IV.

Inquiry into the constitutionality of the defendants' displays must begin, as I have said, with the Supreme Court case of *Lemon v. Kurtzman*, 403 U.S. 602. That inquiry, of necessity, includes *Lynch v. Donnelly*, 465 U.S. 668, and *County of Allegheny v. ACLU*, 492 U.S. 573, in which the Supreme Court directly addressed the issue of whether a government may display an inherently religious, even sectarian symbol, on public property. The Court held in both *Lynch* and *Allegheny* that a government may use a religious symbol to accomplish a secular purpose, if the symbol is displayed in a way that does not create an impression of endorsement in the mind of the reasonable observer. A review of the facts in this case indicates that the defendants have rigorously complied with the criteria established by the Court in both Lynch and Allegheny, and that their displays in no way constitute an establishment of religion.

A.

The first question we must consider under the *Lemon* test is whether the government's display has a secular purpose. *Lemon*, 403 U.S. at 612. "A statute or practice that is motivated in part by a religious purpose may satisfy the first *Lemon* criterion so long as it is not motivated entirely by a purpose to advance religion." *ACLU v. City of Birmingham*, 791 F.2d 1561, 1565 (6th Cir. 1986).

Furthermore, the Supreme Court has informed us that we have "no license to psychoanalyze . . . legislators" and that we must refrain from ascribing improper motives to legislators who "express[] a plausible secular purpose." *Wallace*, 472

U.S. at 74. If the government offers an explanation of its purpose, that explanation is owed deference by the judiciary unless and until shown to be a "sham," for "[w]e must be cautious about attributing unconstitutional motives to state officials." *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997).

Five legitimate secular purposes motivated the defendants to erect the displays in their current format. First, the defendants desired to erect a display of the Ten Commandments that is constitutional. I find in this stated desire nothing that even hints at a primarily religious purpose, much less a sham. Neither the Supreme Court, nor this court, nor any federal appellate court, insofar as I know, has ever suggested that displaying the Ten Commandments is an impermissible objective under the Establishment Clause. In fact, quite the contrary is true. As we stated on one occasion:

> [W]e believe that the Supreme Court's opinion in Stone and Justice Stevens' statements in Allegheny not only acknowledge that the Ten Commandments may be constitutionally displayed, they provide considerable guidance how they can be displayed.

Adland v. Russ, 307 F.3d 471, 489 (6th Cir. 2002), cert. denied, 123 S. Ct. 1909 (2003).

Similarly, there is no reason to doubt the legitimacy of the second and third secular purposes for the displays, namely, to demonstrate that the Ten Commandments were part of the foundation of American law and government, and to recognize the significance of the Ten Commandments in providing the moral and cultural background of the

Declaration of Independence and the foundation of our legal tradition. With respect to these two iterations of the defendants' secular purposes, the majority singles out the Declaration of Independence and complains that "[t]here is by no means a consensus . . . that the source of Thomas Jefferson's belief in divinely-bestowed, unalienable rights, to the extent this belief inspired the writing of the Declaration, was the Ten Commandments or even the Bible." Maj. op. at 25. In fact, the majority seems to hold that no government could ever plausibly proclaim the religious heritage of this nation because the prevailing view among historians is that our founders were primarily inspired by secular influences. *See id.* Not only is this observation a complete non sequitur, it is highly debatable as an historical matter. But more significantly, the source of Thomas Jefferson's "belief in divinely-bestowed, unalienable rights" proclaimed in the Declaration of Independence is utterly immaterial, because it does not resolve the real issue before us today, which is whether the defendants' avowed secular purposes are shams. The Declaration of Independence is not the sole source of evidence that religion, of which the Ten Commandments are a nearly universal symbol, was a significant influence upon the foundation of American law and government. My colleagues' interesting diversion about Thomas Jefferson, the Declaration of Independence, and the Bible offers no basis whatever to conclude, as a matter of law, as my colleagues do, that the defendants' avowed secular purposes are shams.

The influence of religion upon American law and government is a fact of American history and politics that has been widely recognized by scholars, jurists, legislators, presidents, and, not least, the Founders themselves.

In his Farewell Address to the nation, George Washington stated that religion was not only a part of the foundation of our law and government, it was a necessity:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens. The mere Politician, equally with the pious man ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

George Washington, *Farewell Address* (Sept. 19, 1796), in 1 *The Founder's Constitution* 681, 684 (Philip B. Kurland & Ralph Lerner eds., 1987). Similarly Thomas Jefferson, in his First Inaugural Address, listed religion as one of the necessary sources of our nation's prosperity:

> [E]nlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter—with all these blessings, what more is necessary to make us a happy

and a prosperous people?

Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), in *id.* 140, 141.

In fact, in recognition of religion's foundational role in our law and government, both Thomas Jefferson and Benjamin Franklin independently proposed that the new American seal depict Moses leading Israel through the wilderness under the protection of God, with the motto, "Rebellion to Tyrants is Obedience to God." James H. Hutson, *Religion and the Foundation of the American Republic* 50-51 (1998). Although the Continental Congress never accepted Jefferson's and Franklin's proposals, it did adopt a seal with numerous religious references. "What is unmistakable . . . is the theistic framework in which the Continental Congress sought to have the world understand the creation of the American republic." Derek H. Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* 144 (Oxford Univ. Press 2000).

Like Washington, the Continental Congress also drew the connection between religion and government. On October 11, 1782, in a Thanksgiving proclamation near the end of the Revolutionary War, the Congress asked Americans

> to testify their gratitude to God for his goodness, by a cheerful obedience to his laws, and by promoting . . . the practice of true and undefiled religion, which is the great foundation of public prosperity and national happiness.

23 *Journals of the Continental Congress, 1774-1789*, 647

(Gaillard Hunt ed., Government Printing Office 1914). These same sentiments were expressed by the Congress the day after the First Amendment was proposed when it urged President Washington to proclaim "'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many signal favours of Almighty God.'" *See* Davis, *supra* at 89 (citation omitted).

President John Adams likewise described the importance of religion to the American system of government:

> As the safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgment of this truth is not only an indispensable duty which the people owe to Him, but a duty whose natural influence is favorable to the promotion of that morality and piety without which social happiness can not exist nor the blessings of a free government be enjoyed.

John Adams, *Fast Day Proclamation* (Mar. 23, 1798), in *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, 268, 268-69 (James D. Richardson ed., 1899).

These are only a few of the numerous statements by our early political leaders drawing the same conclusion as did the defendants in this case: that religion played a foundational role in American law and government. This is a conclusion, incidentally, that is widely accepted by scholars. As one of the earliest observers of American political life, Alexis de Tocqueville recognized, religion is an essential component of American government:

> Religion in America takes no direct part in the government of society, but it must be regarded as the first of the political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. Indeed, it is in this same point of view that the inhabitants of the United States themselves look upon religious belief. I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions.

Alexis de Tocqueville, *Democracy in America* 305-06 (Alfred A. Knopf, Inc. 1972) (1835). De Tocqueville's observation is confirmed by historical scholarship:

> As intellectual heirs of a tradition which had entwined republicanism and Christian theism, New Englanders in the last two decades of the [eighteenth] century were unable to perceive religion as free from matters of civil government. From ancient history they were convinced that "the state cannot stand without religion" and from their own experience that "Rational Freedom cannot be preserved without the aid of Christianity."

Nathan O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* 168 (Yale Univ. Press 1977) (footnotes and citations omitted). The distinguished jurist and professor of law, Thomas M. Cooley, also recognized the close relationship between religion and American law:

> It was never intended that by the Constitution the government should be prohibited from recognizing religion . . . . The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.

Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 205-06 (The Lawbook Exchange 2000) (1880).

Relevant to our purposes here, the Supreme Court has repeatedly stated that there is a crucial link between religion and our laws and government, for "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This link has been consistently celebrated by our political leaders from the founding to the present day and nowhere has this practice been questioned as fiercely as the majority does today. In fact, the majority's incredulity as to the avowed relationship between religion and our public life is unprecedented:

> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. . . .
>
> Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.

Lynch, 465 U.S. at 674-75.

With regard to the Ten Commandments, the legitimacy of the defendants' view of American history as expressed in their displays is supported by the Supreme Court's own appraisal of its Establishment Clause precedent:

> [I]n *Stone* . . . [our] decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.

Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987).

Moreover, every one of our sister circuits that has considered a challenge to the public display of the Ten Commandments has recognized its foundational role in American law and government and, consequently, has declared that such displays can have a secular purpose.

Most recently, the Fifth Circuit in *Van Orden v. Perry*, No. 02-51184, 2003 WL 22664490 (5th Cir. Nov. 12, 2003), approved of a granite monument inscribed with the Ten Commandments and displayed at the Texas Capitol. Having concluded that the State had a valid secular purpose for the display, the court also affirmed the relationship between the Ten Commandments and American law:

> To say this is not to diminish the reality that it is a sacred text to many, for it is also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people. The power of that

> counsel is evidenced by its expression in the civil and criminal laws of the free world. No judicial decree can erase that history and its continuing influence on our laws--there is no escape from its secular and religious character.

Id. at *7.

In *Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003), the Third Circuit upheld the display of a bronze plaque inscribed with the Ten Commandments that hung alone on the exterior of a county courthouse. The county commissioners had stated at trial that they wanted to maintain the plaque, in part, because they believed that the Ten Commandments contributed to the development of American law. The court held that this was a "'non-sham' secular purpose" and that there was a

> well documented history . . . to the effect that the Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity.

Id. at 267.

The Eleventh Circuit recently approved of a court clerk seal that included an outline of two stone tablets inscribed with the Roman numbers I through X, because the Ten Commandments are a popularly recognized symbol of the law. *King v. Richmond County, Ga.*, 331 F.3d 1271, 1278 (11th Cir. 2003). In its consideration of the seal's secular purpose, the court was satisfied "that during the 1870s the

outline of the Ten Commandments presumably would have enabled illiterate citizens to recognize the legal validity of documents displaying the Seal." *Id.*

The Seventh Circuit, while striking down as unconstitutional a large granite monument bearing an inscription of the Ten Commandments, situated on the Elkhart, Indiana, City Hall grounds, nonetheless noted:

> The display of a religious symbol still may, under certain circumstances, have a secular purpose. The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.

Books v. City of Elkhart, 235 F.3d 292, 302 (7th Cir. 2000).

The Tenth Circuit, using the *Lemon* test, approved of the display of a granite Ten Commandments monument at a city-county courthouse in Salt Lake City. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973). In doing so, the court stated that

> the Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions. . . .
>
> It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era. . . . [W]e cannot say that the monument, as it stands, is more

> than a depiction of a historically important monument with both secular and sectarian effects.

Id. at 33-34. Although *Anderson* predates the Supreme Court's decisions in *Stone*, *Lynch*, and *Allegheny*, neither the Supreme Court nor the Tenth Circuit has overruled *Anderson* and it remains good law. *See Summum v. Callaghan*, 130 F.3d 906, 912 n.8 (10th Cir. 1997).

Thus, in their reasoned judgment, our sister circuits that have had the opportunity to consider this question have unanimously declared the validity of the very same premise that the defendants advance here today: "The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country." This judgment is not precluded by any decision of this court, and, in fact, would seem to be welcomed by it. Having had the opportunity to consider the place of the Ten Commandments in our public life, we have never rejected the historical relationship between the Ten Commandments and our law and government. In *Adland v. Russ*, 307 F.3d 471, we struck down a Kentucky legislative resolution directing that a six-foot tall granite monument inscribed with the Ten Commandments be displayed on the lawn at the State Capitol. The monument, which was totally different from the display at issue here, was essentially a stand alone piece, save for an accompanying clock and some small plaques nearby. Notwithstanding our objections to the monument in that case, we explicitly acknowledged that the Commonwealth could cure the defects in the display. Although we declined to render an advisory opinion on the constitutionality of alternative displays, we applauded the plaintiffs for proposing "to their credit, . . . a historical display showcasing the various

influences on our law by both secular and religious sources." *Id.* at 489-90 (emphasis added).

This collection of sources is not intended to settle the issue of whether the Decalogue is in fact a foundational document in American law and government, for that is not the question before us today. What we must decide is whether the displays were motivated by a secular purpose. In answering that particular question, our only concern is with the defendants' subjective belief, because government action will fail the purpose prong of the Lemon test if the "government intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Specifically, given the defendants' articulation of a secular purpose, we must consider whether such a purpose is a sham, i.e., whether the defendants subjectively believed that the Decalogue was part of the foundation of American law and government and that it provided the moral background of the Declaration of Independence and the foundation of our legal tradition.

Not only is the record utterly devoid of any evidence that the defendants subjectively intended to convey a message of endorsement, but the historical evidence dispels any suspicion that the defendants' theory of American law and history is a sham. In common, ordinary English usage, a sham means a fraud, a hoax, or an intentionally deceptive counterfeit. *See* 15 *Oxford English Dictionary* 159 (2d ed. 1989). Given the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," *Lynch*, 465 U.S. at 674, and the consistent view of the courts that "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society,"

Books, 235 F.3d at 302, it cannot plausibly be said that the defendants' desire to demonstrate the foundational role of the Ten Commandments is a fraud or hoax. The voluminous historical evidence, common sense, and the decisional law of the federal courts all lead to one inevitable conclusion in the case before us: that the defendants' second and third articulated purposes are not shams and should, therefore, be accepted by this court as legitimate secular purposes.

Similarly, there is no evidence in the record that would justify this court in questioning the sincerity of the defendants' fourth articulated purpose: to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government. The displays unquestionably contain numerous documents in "a historical display showcasing the various influences on our law by both secular and religious sources." *Adland*, 307 F.3d at 490. Lest there be any confusion about the displays' educative purpose, the defendants have posted signs explaining that all the documents "played a significant role in the foundation of our system of law and government." The signs go on to describe in considerable detail the significance of each document, including the Ten Commandments, which, the defendants assert, "provide[d] the moral background of the Declaration of Independence and the foundation of our legal tradition." As my earlier discussion of the historical evidence indicates, the defendants' purpose of educating their citizens about the relationship between religion and the American system of law and government is grounded in clear and indisputable fact and, as such, cannot be justifiably characterized as a sham. In their assessment of the relationship between religion and the Declaration of Independence, the defendants got it absolutely

right:

> [T]he numerous references to God were enough to place the Declaration in an overall theistic framework so as to satisfy virtually anyone who held a theistic worldview. Thus in drafting the Declaration of Independence, Thomas Jefferson and his congressional colleagues seized upon, and indeed helped to further shape, a bond between Enlightenment latitudinarianism and Christian orthodoxy that made it possible to formally dissolve all bonds with Great Britain and at the same time confidently assert "the protection of Divine Providence."

Davis, supra at 109.

Nevertheless, according to my colleagues, the displays in this case are defective because they "provided the viewer with no analytical or historical connection between the Ten Commandments and the other historical documents," maj. op. at 27, and, thus, fail to prove conclusively the defendants' thesis: that the Decalogue has a historical connection to American law and government. The majority rejects the evidence, as it appeared in the defendants' brief, "that each of the Ten Commandments were codified, to one extent or another, into the legal codes of some American Colonies, and that some of the Commandments . . . persist to this day in American legal codes." Maj. op. at 24. In doing so the majority complains that this "evidence does not appear in the actual display of the Ten Commandments, so an observer would not actually be made aware of these facts." Maj. op. at 24. Thus, the majority seems to envision a display that

contains a recounting of the history of the nation's founding, a summary of American constitutional law and history, perhaps a syllogism incorporating the foregoing, and, I suppose, at least as much evidence as was presented to this court in the official record of more than 200 pages.

In support of their reasoning, my colleagues cite *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), a case that the majority has both misapplied and misinterpreted and that, nevertheless, bears no factual relation to the case before us. *Stone* was a case about the constitutionality of a Kentucky statute mandating the posting of a copy of the Ten Commandments, standing alone, in every school classroom in Kentucky. Acting upon a petition for a writ of certiorari, and without benefit of oral argument or briefing on the merits, the Court, in a two-page, per curiam opinion from which four justices dissented, summarily reversed the Kentucky Supreme Court's judgment of constitutionality, stating:

> We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.

Id. at 41. Noting that the Court's holding was without precedent, then-Justice Rehnquist called the decision "a cavalier summary reversal" having "no support beyond [the Court's] own ipse dixit." *Id.* at 43, 47 (Rehnquist, J., dissenting).

Although they cite no authority, my colleagues are apparently relying on *Stone* when they state that "a purported historical display must present the Ten Commandments

objectively and integrate them with a secular message." Maj. op. at 18. If this is, in fact, the rule that my colleagues glean from *Stone*, it is not the rule they apply to the facts of the case before us. Rather, the defendants are faulted because they did not choose to display the Ten Commandments in "the most logical way," which the majority defines as "integrating the Ten Commandments with a secular curriculum, such as through the objective study of history, ethics or comparative religion." Maj. op. at 18. This is the actual standard by which my colleagues judge the defendants' displays. Accordingly, my colleagues condemn the defendants' displays because "the Ten Commandments are not integrated with a secular study of American law or government," maj. op. at 21 (emphasis added), and because of "the lack of a demonstrated analytical or historical connection with the other documents [in the displays]," maj. op. at 23 (emphasis added). These criticisms demonstrate that my colleagues think that it is no longer sufficient for a display to serve a secular purpose, for the majority now demands that such a display be "integrat[ed] . . . with a secular curriculum." Maj. op. at 18.

It should first be observed that there is no obligation to display the Ten Commandments in an otherwise secular exhibit in a way that appeals to the logic of scrutinizing federal judges. I am not aware of any authority that would require us to condemn a government display simply because it did not choose "the most logical way" of conveying a message. Furthermore, insofar as the majority relies on *Stone* for guidance in forming its rule that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message," maj. op. at 18, it is better to quote this portion of Stone in full. What the Court actually said in Stone was the following:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.

Stone, 449 U.S. at 42. Clearly, this statement by the Court is a gratuitous hypothetical, describing one possible scenario in which the Kentucky legislature could have mandated the use of the Ten Commandments in the classroom. But this hypothetical simply does not establish a rule that all efforts to post the Ten Commandments on public property must integrate them into a curriculum of study. If that were the case, the Court would have to condemn its own display of Moses, who, bearing the Ten Commandments, is represented among other historical figures in a frieze on the south wall of the Supreme Court courtroom:

> Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside [Moses, Confucius, and Mohammed], however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (footnote omitted) (Stevens, J., concurring in part and dissenting in part).

Rather than attempting to divine a rule from *Stone*, this court should apply the actual rules from the Supreme Court's

landmark decisions approving the government's use of religious symbols: *Lynch* and *Allegheny*. It is revealing that my colleagues are unable to offer any meaningful citation to either of these cases to support their reasoning. This is not surprising given the fact that the Court has never even suggested that there is any validity to the rules my colleagues have crafted today: that a government may display the Ten Commandments in a public building only if they are integrated into a secular curriculum, and that the display must include a narration of the proof of the relationship between religion and the ideas and impulses that contributed to the foundation of American law and government.

In *Lynch*, the Court approved of the use of a crèche in a Christmas display that contained other symbols of the holiday such as a Santa Claus house and reindeer, even though the display contained no signs explaining the secular purpose of the display and the defendants made no attempt to demonstrate the link between the crèche and the celebration of Christmas. Despite the defendant's failure to integrate the crèche into "a secular curriculum, such as . . . the study of history, ethics or comparative religion," see maj. op. at 18, the Court held that the defendant had nonetheless achieved its purpose of "tak[ing] note of a significant historical religious event long celebrated in the Western World." *Lynch*, 465 U.S. at 680.

Similarly in *Allegheny*, where the Court approved of a Christmas display containing a Christmas tree, a menorah, and a sign bearing the phrase "Salute to Liberty," there is not even a hint of the need to integrate the menorah into a secular curriculum. The only other message at the menorah display was the following: "'During this holiday season, the city of

Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.'" *Allegheny*, 492 U.S. at 582 (citation omitted). Justice Blackmun concluded that this "sign serves to confirm what the context [of the display] already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity." *Id.* at 619 (Blackmun, J., concurring). Thus, the defendant was able to achieve the secular purpose of recognizing cultural diversity merely through the context of the display, and not by integrating the menorah into a secular curriculum. Moreover, the defendant's sign confirmed that same secular purpose even though it made no mention of diversity and, therefore, required the reader to make an inferential step in order to draw the connection between "our legacy of freedom" and the "recognition of cultural diversity."

Thus, neither *Lynch*, nor *Allegheny*, nor any other decision, and certainly not *Stone*, support the majority's rule that a government that wishes to use a religious symbol in a public display must integrate that symbol into a secular curriculum. As if the absence of authority were not enough, common sense militates against such a rule. Government monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose. However, in order to integrate the Ten Commandments into a secular curriculum in a manner that would satisfy the majority's new rule, the defendants would have to append to their displays a library of learned treatises and court briefs, or perhaps audio or video accompaniment, explaining beyond all reasonable doubt and in great detail what most Americans already know and the courts have expressly recognized: that

"the Ten Commandments no doubt has played a role in the secular development of our society." *Books*, 235 F.3d at 302. Significantly, the majority has dismissed out of hand the signs accompanying the displays, which, among other things explain that "[t]he Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country." This statement succinctly describes the secular purposes for the displays and, under *Lynch* and *Allegheny*, is more than sufficient.

In its review of the context of the defendants' displays, the majority objects that the displays are "blatantly religious" because they contain an "active symbol of religion" "'concern[ing] the religious duties of believers.'" Maj. op. at 30 (quoting *Stone*, 449 U.S. at 42). This, again, is a novel statement of the law that finds no support in the Supreme Court's landmark decisions of *Lynch* and *Allegheny*. In *Lynch*, the Court approved the display of the crèche despite the fact that the crèche has "special meaning to those whose faith includes the celebration of religious Masses." *Lynch*, 465 U.S. at 685. In *Allegheny*, the Court approved of the display containing the menorah even though it also concerned certain religious duties of the Jewish faith:

> [T]he Talmud prescribes that it is a mitzvah (i.e., a religious deed or commandment) . . . for Jews to place a lamp with eight lights just outside the entrance to their homes or in a front window during the eight days of Chanukah.

Allegheny, 492 U.S. at 583 (emphasis added) (footnote omitted). In both cases, the Court held that these religious icons, which necessarily concerned the religious duties of

believers, were also symbols of a holiday that had both secular and religious meaning. *See Lynch*, 465 U.S. at 680; *Allegheny*, 492 U.S. at 613-14. Therefore, simply because the Ten Commandments may prescribe religious duties for Jews and Christians, that fact alone does not detract from its place as a symbol of the religious origins of our law and government.

Finally, there is no evidence that would undermine the defendants' fifth articulated purpose: to create a limited public forum on the walls of the Harlan County school buildings for the purpose of posting historical documents that played a significant role in the development, origins, or foundations of American and Kentucky law. "The establishment of a public forum is a laudable goal, and part of a worthy tradition dating back to the Greek agora and the Roman forum." *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992). There is simply no indication in the record that the defendants have manipulated the forum in any way or have excluded other speakers from using the forum in a manner that would cause us to believe that this purpose is a sham. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion).

The majority raises an objection to the "evolution" of the displays. In doing so, it adopts the reasoning of the district court, which held that the history of the defendants' earlier attempts to erect constitutionally invalid displays conclusively "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]" *McCreary II*, 145 F. Supp. 2d at 850. This theory of indelible, unconstitutional "taint" not only offends common sense, it is also contrary to the law of this

circuit.

We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future. In *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), we considered whether closing government offices on Good Friday was done for a religious purpose, violating the Establishment Clause. The county's claimed secular purpose was that Good Friday had become part of an extended spring weekend in which many people took a short vacation and very little business was conducted. As evidence that this explanation was a sham, the plaintiffs produced a government sign the defendant had previously posted that depicted a crucifix and stated that the offices were being closed in observance of Good Friday. We rejected the plaintiffs' contention that the defendant's earlier religious purpose forever tainted the secular purpose it proffered at trial. "[T]he fact that a particular closing was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Id.* at 574.

We noted our agreement with Judge Posner of the Seventh Circuit who reasoned in a case factually similar to *Granzeier*, that "Illinois can accomplish much the same thing either by officially adopting a 'spring weekend' rationale for the law, in place of the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts." *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995).

If a unit of government's past unconstitutional conduct forever taints its actions in the future, we would not have advised the defendants in *Adland*, 307 F.3d 471, that they

could cure the constitutional defects in their Ten Commandments display by changing its composition.

> While we cannot pass on the merits of plaintiffs' proposals [to amend the display], we are nevertheless confident that with careful planning and deliberation, and perhaps consultation with the plaintiffs, *the Commonwealth can permissibly display the [Ten Commandments] monument in question.*

Id. at 490 (emphasis added).

Our sister circuits have likewise rejected the idea that a prior unconstitutional display forever taints a subsequent display as religious. In *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), the Third Circuit approved a city's Christmas display that had been modified in response to an Establishment Clause challenge:

> The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose, or that it was intend[ed] to convey a message of endorsement or disapproval of religion.

Id. at 105 (internal quotation marks and citations omitted). In fact, in *Books*, 235 F.3d 292, the Seventh Circuit actually imposed on the defendant an affirmative duty to modify an unconstitutional display:

> [T]he district court must ensure that, although the condition that offends the Constitution is eliminated,

> [the city] retains the authority to make decisions regarding the placement of the monument. *In making those decisions, [the city] has the right and, indeed, the obligation to take into consideration the religious sensibilities of its people and to accommodate that aspect of its citizens' lives in any way that does not offend the strictures of the Establishment Clause.*

Id. at 307 (emphasis added).

The U.S. Supreme Court's holding in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), did not overrule these cases; nor does it require us to find that the defendants' displays are unconstitutional merely due to some past constitutional violation. In *Santa Fe*, the plaintiffs challenged a school district practice that permitted students to deliver invocations and benedictions at graduation ceremonies and football games through the elected office of student council chaplain. In response, the defendants modified their policy in order to permit students, "with the advice and counsel of the senior class principal" to decide by vote whether to have an invocation at graduation. *Id.* at 296 (internal quotation marks and citation omitted). Later, the District drafted another policy entitled "Prayer at Football Games" that permitted students to decide whether to have an invocation at football games. *Id.* at 297. The final iteration of the policy, the "October policy," permitted students to vote whether they wanted to have a student-led "invocation and/or message" at football games, and, if so, who should give the invocation or message. *Id.* at 298 & n.6. It was the October policy that was at issue in *Santa Fe.*

Significantly, the Court announced its holding by stating

that "the text of the October policy alone reveals that it has an unconstitutional purpose." *Id.* at 314 (emphasis added). Thus, while the Court discussed the evolution of the District's prayer policy, *see id.* at 315, it expressly limited its holding to "[t]he narrow question . . . [of] whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny." *Id.* At most, *Santa Fe* held that a modified policy, or display, cannot be used as a shield to prevent litigation. However, *Santa Fe* does not state that a history of unconstitutional displays can be used as a sword to strike down an otherwise constitutional display.

Based on the record before us, there is abundant evidence to conclude that the defendants' declared purposes for erecting these displays were primarily secular, a complete lack of evidence that their purpose was primarily religious, and, therefore, no evidence whatever that the defendants' declared purposes constitute a hoax or fraud upon this court. I conclude that the defendants' displays do not violate the first prong of the *Lemon* test.

B.

The second element of the *Lemon* test, as modified in *Lynch*, is whether a reasonable observer would believe that the challenged government action constitutes an "endorsement" of religion. *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring). Incidentally, the opinions of my brother, Judge Clay, on this issue, are his own and do not represent those of the majority of the panel.

The first thing that must be said about the *Lemon* endorsement test, is that it asks whether a "reasonable

observer"—not a proselytizing religious zealot committed to the establishment of a state religion, or, on the other hand, an indefatigable professional litigant dedicated, in the name of civil liberty, to expunging God, religion, and all reference to religion from the public square—would understand these displays as having a primarily religious purpose and the principal or primary effect of endorsing religion.

As it did with respect to the secular purpose issue, Justice O'Connor's concurrence in *Lynch* "provides a sound analytical framework for evaluating governmental use of religious symbols" to decide the endorsement issue. *Allegheny*, 492 U.S. at 595. *Lynch*, the reader will recall, upheld a Christmas display that included a crèche, a Santa Claus house, reindeer, clowns, an elephant, a teddy bear, colored lights, and a sign bearing the phrase "Seasons Greetings." *Lynch*, 465 U.S. at 671. Justice O'Connor concluded that although the crèche was an inherently religious symbol, a reasonable observer would not view the overall display as an endorsement of religion:

> Although the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.

Id. at 692 (O'Connor, J., concurring).

Justice O'Connor cited "legislative prayers . . . ,

government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court,'" as examples of "government acknowledgments of religion" rather than endorsements of it. *Id.* at 693 (internal citations omitted). She stated: "[The] history and ubiquity [of] those practices are not understood as conveying government approval of particular religious beliefs." *Id.* They

> serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.

Id.

The Supreme Court returned to the issue of government use of religious symbols and the endorsement issue in *Allegheny*, when it considered the legality of two separate holiday displays. The Court held that the first display, a crèche that stood alone in a prominent location inside the county courthouse, violated the Establishment Clause because "nothing in the context of the display detracts from the crèche's religious message." *Allegheny*, 492 U.S. at 598. The Court found it significant that, unlike the crèche in *Lynch*, the Allegheny County crèche was not accompanied by other secular symbols of Christmas. However, the Court approved the second challenged display—a Christmas tree, a menorah, and a sign entitled "Salute to Liberty"—which was located at the city-county building. Justice Blackmun concluded that the second display, in which a religious symbol, the menorah, stood alongside two secular symbols, the Christmas tree and

the sign, would not be perceived by the reasonable observer as an endorsement of religion: "[F]or purposes of the Establishment Clause, the city's *overall* display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season." *Id.* at 620 (Blackmun, J., concurring) (emphasis added).

Applying the analysis from *Lynch* and *Allegheny*, this court in *Adland* found that a reasonable observer would perceive a six-foot granite monument of the Ten Commandments as an endorsement of religion and that nothing in the overall display, which included a clock and several small plaques, reduced or diluted this message of endorsement. The court said it came to that conclusion largely because the monument "physically dominate[d]" the display and "'dwarf[ed]' all the other memorials . . . in the vicinity." *Adland*, 307 F.3d at 487 (internal quotation marks and citation omitted). But we explicitly left the door open for the possibility that some other display that included the Ten Commandments, in addition to secular articles, might pass the Lemon endorsement test if the overall display conveyed "an easily discernible, unified theme to a reasonable observer." *Id.* at 488.

> Without a unifying theme to hold the display together, a reasonable observer could only view the monuments separately. If a reasonable observer views the monuments separately, unconnected by a common context, his or her attention is naturally drawn to the Ten Commandments monument, the largest monument in the display, and its accompanying religious message.

Id.

But that is not this case. Here, the exhibition of ten documents, one religious and the rest secular, all of identical size, none having a position of prominence greater than another, and the whole labeled as contributing to "the foundation of American Law and Government," possesses a "unifying theme" that "hold[s] the display together" and conveys a single secular message that is spelled out in each display. No reasonable observer would ignore the nine secular documents in the display, including the one explicitly declaring the secular purpose for the display, and focus exclusively on the single religious document in order to conclude that the display is an endorsement of religion.

Just like the menorah, the Christmas tree, and the "Salute to Liberty" sign in *Allegheny*, and the crèche, the reindeer, the Santa Claus house, and related secular paraphernalia in *Lynch*, and in each display in this case, it is the documents in their totality that comprise the defendants' displays. Therefore, it is the documents in their totality, their unifying theme, that must be assessed to determine whether a reasonable observer would see them as having the "principal or primary effect" of endorsing religion.

My colleague rejects as "transparent" the defendants' "attempt to 'secularize' the displays by surrounding the Ten Commandments with other patriotic documents and symbols." Maj. op. at 39. Thus, contrary to the directives of the Supreme Court on this issue, my colleague refuses to evaluate the displays in their totality, including the statement of educational purpose that is part of each display, but instead focuses exclusively on the single framed copy of the Ten

Commandments and the history of the defendants' repeated efforts to assemble a display that would satisfy even federal judges.

My colleague makes much of the fact that the Ten Commandments have a "'religious nature.'" Maj. op. at 38 (quoting *McCreary II*, 145 F. Supp. 2d at 851). This indisputable characterization of the Ten Commandments, however, has nothing to do with the issue of our endorsement inquiry, which asks "'what viewers may fairly understand to be the purpose of the display.'" *Allegheny*, 492 U.S. at 595 (emphasis added) (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). In both *Lynch* and *Allegheny*, the Supreme Court approved of displays that contained inherently religious, even sectarian, symbols: the crèche and the menorah. The crucial fact of both of those cases was not that the symbols were religious, but that they were accompanied by secular symbols that, taken together, conveyed no message of endorsement. *See Lynch*, 465 U.S. at 679-81; *Allegheny*, 492 U.S. at 613-14. By focusing on the religious aspect of only one part of the defendants' displays, my colleague conducts precisely the same analysis that the Supreme Court rejected in *Lynch*:

> The District Court plainly erred by focusing almost exclusively on the crèche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated.

Lynch, 465 U.S. at 680. My colleague's error may be summed up as follows: "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.*

In concluding that a reasonable observer would understand these displays, in their totality, as conveying a message of endorsement of religion, because of the religious "taint" imparted by the Ten Commandments, my colleague attributes to reasonable observers an utter lack of common sense, a profound ignorance of American history, and, arguably, an outright hostility to religion in our nation's public life. In my judgment, no reasonable observer, gazing at these displays in McCreary, Pulaski, and Harlan counties could fail to appreciate what, apparently, my colleague does not: that from the founding of the republic, religion was and always has been, an inherent component of the law and culture of our pluralistic society, and that saying so in the public square acknowledges religion, but does not endorse it.

The Supreme Court itself has declared that "religion has been closely identified with our history and government." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963). It is uncontested that depictions of the Ten Commandments and Moses appear in secular context in, among other places, the United States House chamber, the entrance to the national archives, and in three separate locations in the United States Supreme Court, as well as numerous courtrooms and legal settings across the country.

The history and ubiquity of the Ten Commandments in public buildings throughout the country and the universal practice of courts and legislatures publicly invoking God's

blessing and guidance each day, before beginning the public's business, confirm the obvious: The inclusion of the Ten Commandments in these displays did nothing more than acknowledge the indisputable historical role of religion, and especially the canons of the Decalogue, as one of many principles, ideas, values, and impulses that, taken together, influenced the founders of this republic in shaping our law and government. Indeed, to have omitted the Ten Commandments from the collage of documents the defendants labeled "part of the foundations of American Law and Government," would have been historically inaccurate. No reasonable observer would consider the defendants' displays to have the "principal or primary effect" of endorsing religion.

V.

My colleagues' reasoning and conclusions are faithful neither to the language and meaning of the Establishment Clause nor to the Supreme Court's interpretation of it. What the Supreme Court said about the Christmas display in *Lynch* is perfectly applicable to the historical document displays in this case:

> The Court has acknowledged that the fears and political problems that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of

> establishment of a state church is far-fetched indeed.

Lynch, 465 U.S. at 686 (internal quotation marks and citations omitted) (emphasis added).

The district court erred in the legal analysis it applied and clearly erred in its findings of fact in holding that these displays violate the Establishment Clause. Therefore, it also erred in its conclusion that the plaintiffs have a likelihood of success on the merits of their claim, and perforce, abused its discretion in issuing its preliminary injunction.

I would reverse the district court's judgment and set aside the preliminary injunction.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-507

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
PLAINTIFFS,
vs.
McCREARY COUNTY, KENTUCKY, et al.
DEFENDANTS.

ORDER

COFFMAN, District Judge.

This matter is before the court upon the plaintiffs' motion (Record No. 40) for a supplemental preliminary injunction. The court, having reviewed the record and being otherwise sufficiently advised, will grant the motion and enjoin the continued exhibition of the current displays.

Facts

This consolidated case involves the efforts of McCreary and Pulaski Counties and the Harlan County schools to post the Ten Commandments. Having evolved throughout this litigation, the displays at issue originally consisted of only a

framed copy of the Ten Commandments. After several other documents were added, this court found that the amended displays[1] failed the "purpose" and "effect" prongs of the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971),[2] in that they lacked a secular purpose[3] and had the effect of endorsing religion. *ACLU of Ky. v. McCreary County*, 96 F.Supp.2d 679, 689 (E.D.Ky.2000). Accordingly, this court ordered the immediate removal of the displays from the courthouses and school system.

The defendants then erected a third set of displays which

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[1] While they varied as to content, all three amended displays were held unconstitutional by this court, which found that "[w]hile some of the documents [were] displayed in their entirety, the defendants ha[d] excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text." *ACLU of Ky. v. McCreary County*, 96 F.Supp.2d 679, 684 (E.D.Ky.2000).

[2] Under the *Lemon* test, (1) the government action must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the action must not result in "excessive governmental entanglement with religion." *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105.

[3] This court found that the display's history and composition evinced no secular purpose. Though the government's stated purpose is entitled to some deference, the court held that its task was to "examine the actual purpose of the use of the religious objects and ... not blindly accept an allegedly secular purpose which is contrary to the facts of the case." *McCreary County*, 96 F.Supp.2d at 687.

also included the Ten Commandments. Those displays, entitled "The Foundations of American Law and Government Display," included the full text of the Magna Carta as enacted in 1215 A.D., the Declaration of Independence, the Bill of Rights of the Constitution of the United States, the Star Spangled Banner, the Ten Commandments with a Biblical citation, and the Mayflower Compact of 1620; a picture of Lady Justice and an explanation of its significance; the National Motto of the United States ("In God We Trust") emblem and the Preamble to the Kentucky Constitution; and an explanation of each of the documents' historical and legal significance.[4]

After the hearing on this motion and resulting settlement negotiations, the McCreary and Pulaski County displays were again modified; the Scripture reference of "Exodus 20:3-17" and the phrase "King James Version" were eliminated from the Ten Commandments document. The Harlan County School Board display remains as it existed at the time of the hearing, but the school board has adopted a "Historical Document Placement Procedure" which implements its resolution for posting historical documents.

The plaintiffs, having asked this court to expand the

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[4] The display in the Harlan County schools differed only in that it replaced the picture of Lady Justice with the text of Ky. Rev. St. § 158.195 (allowing posting of documents), the Ten Commandments document was a page from the Congressional Record declaring 1983 the year of the Bible (which contains a copy of the Ten Commandments), and that the explanation posted was in the form of a resolution of the Harlan County School Board.

preliminary injunction to include the current display,[5] must establish: (1) a strong or substantial likelihood of success on the merits; (2) that they will suffer irreparable harm in the absence of an injunction; (3) that others will not suffer substantial harm if the injunction is granted; and (4) that an injunction will serve the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). Because the parties focus on the first of these elements and confine their arguments to the "purpose" and "effect" prongs of the *Lemon* test, the court will concentrate on these aspects of the issue. The court's analysis is governed by *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), and *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir.2000).[6]

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[5] Although the plaintiffs' motion actually challenged the third set of displays, this ruling encompasses both the third and fourth sets of displays.

[6] *Stone* is the only U.S. Supreme Court case on point and *Books* is the only circuit-court case which directly confronts the instant issue and which has not been called into question. The court takes note of the Supreme Court's recent denial of certiorari in *Books*, which was marked by dissent. *See City of Elkhart v. Books*, 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001). Additionally, the court is aware that *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir.1973) (*cert. denied*, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973)), is a court-of-appeals case which reviewed the constitutionality of a Ten Commandments monument in light of the Establishment Clause; *Anderson*, however, predated *Stone*, and the Tenth Circuit has acknowledged that *Stone* undermines *Anderson's* continuing validity. *See Summum v. Callaghan*, 130 F.3d 906, 913 n. 8 (10th Cir.1997). While a number of other circuit-court cases involve challenges to Ten Commandments displays, they fail to address substantively the

Analysis

As *Stone* and *Books* direct, the test used to determine the constitutionality of the current display is that set out in *Lemon v. Kurtzman*, *supra*. Therefore, we look for the display to have a secular purpose, for its principal or primary effect (as seen by the reasonably well- informed observer) neither to advance nor inhibit religion, and for a lack of excessive entanglement.[7]

Purpose

Although the Supreme Court typically gives deference, in religion cases, to the government's articulated purpose, where the Ten Commandments are at issue the Court has rejected

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Establishment Clause issue. *See, e.g., DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir.1999) (*cert. denied*, 529 U.S. 1067, 120 S.Ct. 1674, 146 L.Ed.2d 483 (2000)); *Zichko v. Clegg*, 162 F.3d 1171 (9th Cir.1998) (*cert. denied*, 526 U.S. 1162, 119 S.Ct. 2055, 144 L.Ed.2d 221 (1999)) (unpublished); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir.1997); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir.1997); *Freedom From Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir.1988).

[7] In recent jurisprudence, the latter two elements of the *Lemon* test, see note 2, *supra*, have been collapsed into the question of whether the display is viewed as government endorsement of religion. The "endorsement" test is treated as a refinement of *Lemon*. *See Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring); *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999); *Adland v. Russ*, 107 F.Supp.2d 782, 785 (E.D.Ky.2000).

the proffered purpose and found instead that the document is a sacred text which has a religious purpose. *See Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).[8] The government must dilute this religious purpose if a truly secular purpose can be said to exist. *See Books*, 235 F.3d at 303. This rejection of stated purpose has occurred even when secular symbols were used in conjunction with the Ten Commandments,[9] just as this court must reject the stated purpose even when the defendants place the Ten Commandments in a display with secular documents.

With regard to the current displays, the defendants have articulated a number of purportedly secular purposes. Their stated intentions include: (1) "[T]o erect a display containing the Ten Commandments that is constitutional"[10]; (2) "to demonstrate that the Ten Commandments were part of the

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[8] While not an explicit rejection of such an articulation, the Supreme Court declined to grant certiorari in *Books*, 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1039 (2001), where the Seventh Circuit had similarly rejected the city's stated purpose. *See Books*, 235 F.3d at 303-04 ("we hold that the City of Elkhart's avowed secular purpose of recognizing the historical and cultural significance of the Ten Commandments 'is not sufficient to avoid conflict with the First Amendment' " (quoting *Stone*, 449 U.S. at 41, 101 S.Ct. 192)).

[9] *See Books*, 235 F.3d at 296 (monument included an "all-seeing eye" and an American eagle grasping the American flag).

[10] Record No. 44, pp. 3, 4.

foundation of American Law and Government"[11]; (3) "[to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the Declaration of Independence and the foundation of our legal tradition'"[12]; (4) "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government"[13]; and (5) [as stated by the Harlan County School Board] "to create a limited public forum on designated walls within the school district for the purpose of posting historical documents which played a significant role in the development, origins or foundations of American or Kentucky law...."[14] While these stated purposes are to be given some deference, "it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.' " *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring in judgment)). Our task is made easier by the fact that the first three of these purposes are, on their face, religious in nature and therefore impermissible, while the history of the display belies the secular intentions of the other two.

Viewed facially, the first three of the defendants' stated

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[11] Record No. 44, p. 10.

[12] Record No. 44, p. 15 (quoting the explanation of the Ten Commandments placed near the display).

[13] Record No. 44, p. 13.

[14] Record No. 56, exh. B.

"secular" purposes run afoul of the Supreme Court's holding in *Stone v. Graham*, because that case established that a state's desire to proclaim the Ten Commandments' foundational value for American law and government is a religious, rather than secular, purpose. In *Stone*, the Commonwealth of Kentucky sought to post the Ten Commandments along with the following notation: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Stone*, 449 U.S. at 41, 101 S.Ct. 192. This putatively secular purpose, which is fundamentally the same as the defendants' first three articulated purposes, was rejected by the Court. The majority declared that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment.... The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.*[15]

The defendants' latter two articulated purposes, while facially secular in that they do not single out the Ten

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[15] It bears emphasis that this court is not commenting on the truth of the defendants' assertion of the Ten Commandments as a "foundational document." Like the Seventh Circuit, we recognize that "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *Books*, 235 F.3d at 302 (noting the frieze on the wall of the U.S. Supreme Court, which depicts Moses holding the Ten Commandments, along with other religious and non-religious lawgivers).

Commandments, crumble nonetheless upon an examination of the history of this litigation. "The Supreme Court has stressed the importance of the context of a clearly religious symbol in determining whether the purpose in displaying the symbol is religious or secular." *Books*, 235 F.3d at 303. To determine this context, the Seventh Circuit examined the history of the city's involvement in the monument's placement, from the initial dedication ceremony[16] to the city's adoption of a resolution in response to the then-pending litigation,[17] concluding that the city's purpose for displaying the monument was not secular. *See id.* at 304. In the present case, the history of these displays indicates that the

[16] The court found that the remarks of the speakers at the monument's dedication--a Catholic priest, a Jewish rabbi, and a Protestant minister--showed that "the purpose for displaying the monument was not only to provide youths with a common code of conduct to guide their participation in the civil community but also to urge the people of Elkhart to embrace the specific religious code of conduct taught in the Ten Commandments." *Books*, 235 F.3d at 303. Thus, the circumstances accompanying the monument's display emphasized the "inherently religious nature of the Ten Commandments." *Id.*

[17] In a manner similar to that of the instant defendants, the *Books* resolution characterized the monument and its symbols as acknowledging the Ten Commandments' historical and cultural significance, specifically the Commandments' effect on "the development of the fundamental legal principles of Western Civilization." *See Books*, 235 F.3d at 297. The court, however, looking to precedent, concluded that the resolution "ought to be accorded no more weight than the avowed secular legislative purpose articulated by the Kentucky legislature in Stone." *Id.* at 304.

defendants' overall purpose is religious in nature: to display the Ten Commandments. It is significant that the first displays, containing only the Ten Commandments, were erected in violation of the Supreme Court's clear ruling in *Stone*.[18] This defiance imprinted the defendants' purpose, from the beginning, with an unconstitutional taint observed not only by this court, but by anyone acquainted with this litigation.[19] The second set of displays (the subject of this

[18] The *Stone* court did not hinge its ruling upon the mandatory nature of the statute requiring schools to post the Ten Commandments; rather, it emphasized the message sent by the posting of a lone religious text, noting that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum ...." *Stone*, 449 U.S. at 42, 101 S.Ct. 192.

[19] This case is distinguishable from the situation in *ACLU of New Jersey v. Schundler*, 168 F.3d 92 (3rd Cir.1999), where the Third Circuit rejected the argument that the government's initial holiday display and subsequent modifications could be regarded as evidence of the official's bad faith because

> the Supreme Court's decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith. Although the original Jersey City display was ultimately struck down, no Supreme Court or Third Circuit precedent clearly established that it was unconstitutional until the prior panel handed down its decision, and therefore the city officials'

court's previous ruling) accentuated the defendants' religious purpose, rather than diminishing it, by posting the Commandments along with "specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references." *ACLU of Ky. v. Pulaski County*, 96 F.Supp.2d 691, 699 (E.D.Ky.2000).

In their third and fourth attempts, the defendants have posted the Ten Commandments alongside the full text of various historical documents, purporting to educate the citizens of McCreary and Pulaski Counties and the schoolchildren of Harlan County regarding the history of this nation's law and government. It is this court's function to determine " 'whether the government's actual purpose is to endorse or disapprove of religion,' " *Books*, 235 F.3d at 302

> decision to erect that display, which had been put up for decades, can hardly be viewed as evidence of an intent to flout the Establishment Clause.

Id. at 105 (footnotes omitted). In contrast, Supreme Court precedent regarding the posting of the Ten Commandments--*Stone v. Graham*--has not been marked by "fine line-drawing," nor was the counties' initial Ten Commandments display the product of "miscalculation." The initial display was in blatant disregard of a long-standing Supreme Court opinion clearly establishing its unconstitutionality. That fact, coupled with the even more overtly religious second display, in which the defendants selected only religious portions from historical American documents, lends credence to this court's determination of the defendants' religious purpose in this case.

(quoting *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (emphasis added)), a function we undertake by evaluating the totality of the circumstances. *See id.* In light of the history of the government's involvement in these displays, the defendants' purpose is clear. This purpose--posting the Ten Commandments--is improper and violative of the Establishment Clause "because it sends the ancillary message to ... nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Id.* at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)). Thus, the defendants' fourth and fifth articulated purposes do not fundamentally differ from their first three, and do not suffice to show that the government is motivated by a secular purpose in posting the current displays. Accordingly, the current displays fail the first prong of the *Lemon* test, in that they lack a secular purpose.

Effect

While failure of any prong of *Lemon* results in an Establishment Clause violation, this court will complete its analysis by considering the effect of the current displays. The second prong of *Lemon* is met when a government action's "principal or primary effect ... neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612, 91 S.Ct. 2105. The "effect" prong has more recently been articulated as the endorsement test, which "prohibits speech that a reasonable observer would think is an endorsement of religion by the government." *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999); *see also* note 7, *supra*. To make this determination,

the court must look at the "totality of the circumstances surrounding the display." *Books*, 235 F.3d at 304. Moreover, the "reasonable observer" is considered to be one who is "familiar with the history and placement" of the display, rather than one who sees it with no prior knowledge.[20] In the case at bar, the composition, setting, and history of the current displays would lead a reasonable observer to interpret them as the county governments' endorsement of religion.

The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American[21] historical documents. Given the

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[20] *Books*, 235 F.3d at 306. *See also Santa Fe Ind. Sch. Dist.*, 530 U.S. at 308, 120 S.Ct. 2266 ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.' ") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29 (O'Connor, concurring in judgment)).

[21] The Magna Carta and the picture of Lady Justice are the exceptions here, the only documents (besides the Ten Commandments) which are not unique to American history. Their inclusion, however, does not sufficiently broaden the display to encompass "world history" or to make it a survey of various civilizations' legal codes, so as to dilute the uniquely religious message of the Ten Commandments.

religious nature of this document,[22] placing it among these patriotic and political documents, with no other religious symbols or moral codes of any kind, imbues it with a national significance constituting endorsement. The Ten Commandments are completely different from the remainder of the displays. The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement. The Seventh Circuit has adopted similar reasoning; when considering the effect of a Ten Commandments monument, the *Books* court found that "the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion ... and civil government." *Books*, 235 F.3d at 307. The counties have not, despite their avowed efforts, erected the type of

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[22] *Stone* recognized that:

> The Ten Commandments are undeniable a sacred text in the Jewish and Christian faiths .... [which] do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Stone, 449 U.S. at 41-42, 101 S.Ct. 192 (citations omitted).

"appropriate educational display" which might "try to include all the various moral, historical, and political influences on our legal system' such as the Code of Hammurabi, the Code of Justinian, and passages from early English cases." *Harvey v. Cobb County*, 811 F.Supp. 669, 678 (N.D.Ga.1993). Instead, the current set of displays conveys the counties' comment on the Ten Commandments' (and consequently, religion's) foundational value to our shared history as citizens; a reasonable person would perceive this message as endorsement.

Furthermore, the setting of these displays--in the McCreary and Pulaski County courthouses and in the Harlan County public schools--has the effect of advancing religion. The courthouse displays are posted at the seat of government, which " 'is so plainly under government ownership and control' that every display on its property is marked implicitly with government approval." *Books*, 235 F.3d at 306 (quoting *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir.1987)).[23] *Stone* confirms that this observation

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[23] The court also noted that:

> In fulfilling our responsibility to apply faithfully the Establishment Clause jurisprudence of the Supreme Court of the United States, we have subjected to particularly careful scrutiny displays at the seat of government. We have taken this course because "[a]n important concern of the effects test is ... 'whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, or their individual religious choices.'"

Books, 235 F.3d at 305 (quoting *American Jewish Congress*, 827 F.2d at 127).

extends to the public school setting.[24] Like the monument in *Books*, the current set of displays conveys a message of endorsement, despite the inclusion of secular documents and symbols. The fact that this religious message is exhibited within public places of great importance, such as the seat of government and the public schools, heightens the effect of advancing religion and the consequent violation of the Establishment Clause.

Finally, the history of these displays bolsters the reasonable observer's perception of the state endorsement of religion. The reasonable observer viewing these displays would know of the defendants' previous attempts to post the Ten Commandments alone and surrounded by religious excerpts from historical documents. Even without this specific knowledge, a reasonable observer must be charged with knowing something of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments. The defendants' non-secular purpose would be known to such a viewer and

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[24] "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone*, 449 U.S. at 42, 101 S.Ct. 192.

would increase the displays' religious effect by conveying the message that the counties had succeeded not in posting a display of "The Foundations of American Law and Government," but in posting the Ten Commandments. Thus, these displays likewise fail the "effect" prong of the Lemon test.

Conclusion

The Supreme Court has recognized two constitutionally permissible uses of the Ten Commandments within the public arena. The first is where "the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S. at 42, 101 S.Ct. 192 (citing *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). The second is in a display incorporating both religious and secular figures, "signal[ing] respect not for great proselytizers but for great lawgivers,"[25] such as the frieze on the wall of the United States Supreme Court.[26] The first use

[25] *County of Allegheny v. ACLU*, 492 U.S. 573, 652-53, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Stevens, J., concurring in part and dissenting in part).

[26] The frieze on the south wall of the Court depicts Moses holding the Ten Commandments, along with Menes, Hammurabi, Solomon, Lycurgus, Solon, Draco, Confucius, Octavian, and the allegorical figures of Fame, Authority, Light of Wisdom, and History. The frieze on the north wall includes Justinian, Muhammad, Charlemagne, King John, Louis IX, Hugo Grotius, Sir William Blackstone, John Marshall, Napoleon, and the allegorical figures of Liberty and Peace, Right of Man, Equity, and

of the Ten Commandments has a teaching function and was suggested in a case involving a school,[27] while the second use has a legal-historical function and appears in a courtroom rather than a schoolhouse. Thus, these defendants have been given clear guidance by the United States Supreme Court for use of the Ten Commandments in their own venues.

At any rate, the current displays are clearly outside the bounds of these permissible uses and are violative of the Establishment Clause. Thus, the defendants have shown a strong or substantial likelihood of success on the merits. As the facts and analysis of the remaining three elements required for a preliminary injunction remains the same here as in our previous opinions in this case,[28] those elements are met and the injunction will be extended. Accordingly,

IT IS ORDERED that the plaintiff's motion to extend the preliminary injunction to the current displays is GRANTED.

IT IS FURTHER ORDERED that the displays shall be removed from the McCreary and Pulaski County courthouses and from the Harlan County schools IMMEDIATELY.

IT IS FURTHER ORDERED that the parties shall submit joint written status reports no later than July 23, 2001,

Philosophy. There are also friezes on the east and west walls.

[27] *See Stone*, 449 U.S. at 42, 101 S.Ct. 192.

[28] *See, e.g., McCreary County*, 96 F.Supp.2d at 690-91.

advising the court whether they wish this order to be the final judgment in this case.

This 22nd day of June 2001.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-507

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
PLAINTIFFS,
vs.
McCREARY COUNTY, KENTUCKY, et al.
DEFENDANTS.

ORDER

COFFMAN, District Judge.

This matter, which presents a First Amendment challenge to a display of the Ten Commandments and other documents,[1]

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[1] The subject display originally included only the Ten Commandments. Because the court here concludes that later modification of the exhibit was merely a futile attempt to render constitutional the original Ten Commandments display, that alteration was analytically meaningless when measured by the Establishment Clause of the First Amendment. The court thus uses interchangeably the terms "Ten Commandments display," "religious display," "display of the Ten Commandments and other documents," and similar phrases to describe the exhibit here at

is before the court upon the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss. This court held a hearing on April 20, 2000 and, having reviewed the arguments of counsel and being otherwise sufficiently advised, will grant the plaintiffs' motion for a preliminary injunction and will deny the defendants' motion to dismiss.[2]

Motion to Dismiss

For the reasons explained below, the plaintiffs have stated a claim for a First Amendment violation. The defendants also have raised two procedural grounds for their motion to dismiss, arguing that the plaintiffs lack standing to bring their claims and that they were ineffectually served.

The defendants contend that the plaintiffs lack standing to bring these actions because they have not alleged "injuries in fact." The injury-in-fact component of standing requires a plaintiff to have a personal stake in the matter to be adjudicated. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

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issue.

[2] This is one of three companion cases, simultaneously filed, which attack such displays. Any minimal variances among the three displays possess no legal significance for the purpose of the motions now pending before the court. Having observed that the case records also share similar complaints, memoranda, and motions and that the three cases share identical lead counsel on both sides, the court combined the three for oral argument and today enters virtually identical opinions--with necessary but slight factual variations--in all three.

560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The defendants correctly note that abstract or hypothetical injuries are insufficient. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The plaintiffs in this lawsuit, however, have suffered and are under the threat of suffering concrete injuries.

In *Washegesic v. Bloomingdale Public Sch.*, 33 F.3d 679, 683 (6th Cir.1994), the court considered a challenge to a public school's display of a portrait of Jesus. A former student was determined to have standing because he would come into unwelcome direct contact with the display while visiting the school to attend sporting events or meet former teachers. *Id.* The court held that even a member of the PTA or of the public would have standing if she attended events in the school and "took the portrait as a serious insult to her religious sensibilities." *Id.* Like the plaintiff in that case, the plaintiffs here have standing because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.

The defendants cite several Seventh Circuit cases holding that in order to have standing in an Establishment Clause challenge, a plaintiff must undertake a special burden or alter his or her normal routine to avoid the offensive object. In *Gonzales v. North Township of Lake County, Ind.*, 4 F.3d 1412 (7th Cir.1993), for example, the plaintiffs challenged the presence of a crucifix in their city's park. The plaintiffs' discontinued use of an area within the park conferred standing. *Id.* at 1417. Here, the plaintiffs have not specifically alleged that the display has forced them to alter their normal routines. The necessary alterations would be highly impractical, however, because they must enter the courthouse

to conduct civic business, and therefore the individual plaintiffs have met the standing requirement for their First Amendment claim.

The defendants' claim that the American Civil Liberties Union ("ACLU") lacks organizational standing likewise must be rejected. In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Supreme Court held:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 342, 97 S.Ct. 2434, quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here, the ACLU has members in McCreary County who would have standing for the same reason that the named plaintiffs have standing. Furthermore, this lawsuit will not require the individual participation of ACLU members. Thus, the ACLU has organizational standing.

The defendants next claim that they were not properly

served under Fed. R. Civ.P. 4. Rule 4(j)(2) provides that a county may be served "by serving the summons and complaint in the manner prescribed by law of that state for the service of summons." The Kentucky Rules of Civil Procedure allow a summons to be served by mail. Ky.R.Civ.P. 4.01(a). Under the Kentucky rule, the clerk of court actually mails the summons. Here, the plaintiffs placed the summons in the mail themselves, and the defendants argue that the service was ineffective because the clerk of court did not place the summons in the mail. The federal clerks of court do not, however, place summons in the mall for plaintiffs. The Federal Rules of Civil Procedure permit service "in the manner" allowed by their state counterparts--here, mailing. That the plaintiffs rather than a clerk of court mailed the summons does not render it ineffective. Accordingly, the defendants' motion to dismiss will be denied.

Preliminary Injunction

A preliminary injunction preserves the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). To receive a preliminary injunction, a plaintiff must establish: (1) a strong or substantial likelihood of success on the merits; (2) that he or she will suffer irreparable harm in the absence of an injunction; (3) that others will not suffer substantial harm if the injunction is granted; and (4) that an injunction will serve the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). These four factors guide the discretion of the court and are not unbending prerequisites. *Id.*

A party need not prove his case in full at a

preliminary-injunction hearing. *Camenisch*, 451 U.S. at 395, 101 S.Ct. 1830. The court must, however, make findings of fact and conclusions of law, which are not binding at a trial on the merits, *United States v. Owens*, 54 F.3d 271, 277 (6th Cir.1995), when deciding a motion for a preliminary injunction. The court need not make specific findings of fact regarding each of the four factors if fewer are dispositive. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir.1994). In a case brought under the First Amendment, the likelihood of success on the merits frequently may be the determinative factor. *Connection Distrib.*, 154 F.3d at 288.

Findings of Fact

McCreary County officials recently erected in the McCreary County courthouse a Ten Commandments display, pursuant to an August 17, 1999 fiscal court order, signed by the defendant Jimmie Greene, that the display be posted in "a very high traffic area" of the courthouse. When this suit was filed, the display consisted of at least one framed copy of one version of the Ten Commandments and was not part of any larger educational, historical, or retrospective exhibit. After this lawsuit was filed, the defendants amended the display to include several other documents.[3] At oral argument, the defendants conceded that they did so in an attempt to bring

[3] The defendants argue that because they altered the display, the plaintiffs' complaint is moot. Their argument fails because the new display is effectively a continuation of the original display, and the plaintiffs raise the same objections to the amended display.

the display within the parameters of the First Amendment and to insulate themselves from suit. The display, both in its original form and as amended, is readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.

As it now exists,[4] the display consists of (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact. While some of the documents are

[4] At oral argument, it appeared that the original exhibit of the Ten Commandments was removed and replaced with the text of theCongressional Record which includes a copy of those Commandments. The exhibits attached to the defendants' brief, however, include a photograph of the Pulaski County Courthouse display in which the large framed copy of the Ten Commandments remains, with the other, smaller documents hanging to one side. For the purposes of this motion, either scenario produces the same result.

displayed in their entirety, the defendants have excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text.

Conclusions of Law

1. Likelihood Of Success On The Merits

The plaintiffs seek injunctive and declaratory relief under 42 U.S.C. § 1983, arguing that the continued posting of the Ten Commandments in the McCreary County courthouse violates their First Amendment rights. Section 1983 creates a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. *See Conn v. Gabbert*, 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Section 1983 does not create separate substantive rights, but merely provides a method of vindicating independently conferred federal rights. *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). A plaintiff must allege two elements to establish a prima facie case under § 1983:(1) that the action occurred "under color of law"; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In a § 1983 case brought against a defendant in his official capacity, the governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation; thus, in an official-capacity suit, the entity's policy or custom must have played a part in the violation of federal law. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Here, the plaintiffs have shown a substantial likelihood of success on the merits for both elements required by a § 1983 claim. First, Jimmie Greene acted under color of state law [5] and in his capacity as County Judge Executive when he promulgated the August 17, 1999 Fiscal Court order requiring that the Ten Commandments be displayed in the courthouse. Greene possessed policy-making authority, so that his order to post the Ten Commandments constituted official McCreary County policy. That policy serves as a driving force behind the constitutional violations alleged in this case. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Second, violations of the First Amendment such as those alleged in this case are remediable through a § 1983 claim. The First Amendment declares, "Congress shall make no law. respecting an establishment of religion...." U.S. Const. amend I. Pursuant to the Establishment Clause of the First Amendment, governmental bodies may not "take a position on questions of religious belief or [make] adherence to a religion relevant in any way to a person's standing in the

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[5] A § 1983 defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Indeed, Greene's activities must be subjected to First Amendment scrutiny because in hanging the Ten Commandments in the courthouse, he acted as a public, government official, not as a private citizen. *See County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

political community." *County of Allegheny v. ACLU*, 492 U.S. 573, 594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)). Government actions challenged under the Establishment Clause are reviewed under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under *Lemon*, the governmental action first must have a secular purpose and "second, its principal or primary effect must be one that neither advances nor inhibits religion." Finally, the governmental action must not result in "excessive governmental entanglement with religion." *Id.* at 612-13, 91 S.Ct. 2105. In the past decade, the Supreme Court has reframed the *Lemon* analysis, focusing on whether either the purpose or the effect of the challenged governmental action results in the endorsement of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Courts in this circuit treat the endorsement test as a refinement or clarification of the *Lemon* analysis, *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999), and this court will apply that test to decide whether the Ten Commandments display, both in its original form and as amended, passes constitutional muster.

The endorsement test forecloses governmental action that "a reasonable observer would think is an endorsement of religion by the government." *Id.* Justice O'Connor formulated the endorsement test, explaining:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring).[6] In other words, the challenged conduct must have both an actual secular purpose and also the effect of neither advancing nor hindering religion. Because the government's use of a religious reference or of an object with religious meaning may be appropriate under some circumstances but not in others, the court must assess the constitutionality of government conduct with careful attention to the manner and context of the action. *Compare Allegheny*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472, with *Lynch*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (display of creche held unconstitutional in former but constitutional in latter).

The purpose prong of the endorsement analysis asks whether a secular purpose actually motivated the government's action.

> In considering the purpose prong ... the focus of the inquiry is on the intentions of the government. Namely, did the government intend to convey a message of endorsement or disapproval of religion when it implemented the challenged policy. Courts should generally be deferential to the government's

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[6] The endorsement test was adopted by a majority of the Court in *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086.

> articulation of a secular purpose. The government's secular purpose, however, must be sincere and not a mere sham. Although the government's purpose need not be exclusively secular, a practice will violate the Establishment Clause if it is entirely motivated by a purpose to advance religion.

Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 384 (6th Cir.1999), citing *Edwards v. Aguillard*, 482 U.S. 578, 585-86, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Lynch*, 465 U.S. at 681 n. 6, 104 S.Ct. 1355; *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). *See Granzeier*, 173 F.3d at 574. Here, the court will look to the County's proffered purpose, the brief history of the Ten Commandments display, and the display itself to determine whether the display serves an actual, secular purpose.

In its original form, the Ten Commandments display, consisting only of the Commandments unaccompanied by any other documents, lacks any secular purpose. The Ten Commandments are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God, and their very nature precludes a finding of a prevailingly secular purpose here. Indeed, "the pre-eminent purpose for posting the Ten Commandments ... is plainly religious in nature." *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).[7]

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[7] While the defendants suggest that *Stone* is inapplicable here because it dealt with legislative action and declared the posting of the Ten Commandments to be unconstitutional without the benefit of full briefing, it nevertheless is still good law and this court is bound by its precedential value. The court cites the case today merely to establish that the Ten Commandments are a distinctly religious text and that their posting has a religious purpose.

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See* Exodus 20:1-11; Deuteronomy 5:6-15.

Id. at 41-42, 101 S.Ct. 192. In their briefs and at oral argument, the defendants suggest that the Ten Commandments were posted in order to teach McCreary County residents about American religious history and the foundations of the modern state. The defendants also concede that the display purports to demonstrate America's Christian heritage.[8] The narrow scope of the display--a single religious

[8] Such an overtly Christian purpose violates the Establishment Clause. While the court recognizes that the Christian tradition has played an important role in American culture, the defendants' reliance on *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), is misplaced. In that case, the Supreme Court examined whether a service contract between an incorporated church and a foreign minister fell within the purview of a statute regulating the import of foreign laborers. The Court's

text unaccompanied by any interpretation explaining its role as a foundational document--can hardly be said to present meaningfully the story of this country's religious traditions, and for this court to conclude that the original display had a secular purpose belies reason.

The challenged display now includes other documents which the defendants argue illustrate the display's secular purpose: the education of McCreary County residents concerning American religious history. As the Supreme Court has made abundantly clear in its articulation of the endorsement test, the court must examine the actual purpose of the use of the religious objects and should not blindly accept an allegedly secular purpose which is contrary to the facts of the case. Furthermore, the requirement of a secular purpose "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691, 104 S.Ct. 1355 (O'Connor, J., concurring). While the government's stated purpose may be entitled to some deference, the history of the display here and the choice of documents in the display contradict the County's assertion. That the display originally consisted solely of the Ten Commandments and that it was altered--albeit without any legally significant change--only after this lawsuit was filed weigh heavily against the finding of a secular purpose.

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analysis focused upon and delineated rules of statutory construction and did not entail First Amendment jurisprudence. Indeed, the language cited by the defendants is dicta and is neither that Court's ruling nor vital to its ruling.

Likewise, a review of the documents themselves forecloses a characterization of the purpose of the display as secular. The County narrowly tailored its selection of foundational documents to incorporate only those with specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references. The display does not appear to have been intended to educate McCreary County residents, in a balanced or accurate manner, about the traditions and texts that were drawn upon by this nation's founders or about the complex role religion has played in this country's history. In short, as shown by the facts of the case and the display itself, the exhibit--both in its original form and as altered--serves no secular purpose, nor was it ever intended to do so. As the display clearly lacks a secular purpose, it violates the First Amendment and the court's analysis need go no further. *See Wallace*, 472 U.S. at 56, 105 S.Ct. 2479. The court, however, will complete the *Lemon* analysis to determine whether the effect of the display also violates the Establishment Clause.

In determining such an effect, the court must ask whether an objective observer acquainted with the display would perceive it as a governmental endorsement of religion. *See ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703 (6th Cir.2000). The objective-observer standard parallels the reasonable-person standard in torts law; the question is not whether one particular, uninformed, subjective observer would view the display as an endorsement of religion but whether an objective, reasonable, knowledgeable observer would do so. Here, the prevailing effect of the display is one of governmental endorsement of religion.

The overriding theme of each individual document as

presented in the display and of the display as a whole is one of religion and more specifically of Christianity. The first document is a copy of the Congressional Record from February 2, 1983, proclaiming that year the Year of the Bible and reflecting the remarks of Representative Phillip M. Crane about his personal beliefs concerning the importance of the Bible and the Ten Commandments, a version of which is included in the remarks. The next document consists of two brief excerpts: one from the Declaration of Independence, "All men ... are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and one from the Constitution of Kentucky, "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution." The next document is President Lincoln's Proclamation of a Day of Prayer. Issued in 1863, it confesses to God and seeks forgiveness for national sins committed during the Civil War. Another presidential proclamation follows, from President Reagan, declaring 1983 the Year of the Bible in honor of its influence in shaping America. A copy of the Mayflower Compact follows, in which the colony's founders invoke "the name of God" and explain that their journey was taken, among other reasons, "for the glory of God and advancement of the Christian faith." Finally, bearing a picture of Abraham Lincoln, the next states, "The Bible is the best gift God has ever given to man."

While a display of some of these documents may not have the effect of endorsing religion in another context, they collectively have the overwhelming effect of endorsing religion in the context of this display. No reasonable observer

of the display could conclude otherwise. Each and every document refers to religion. Several have been edited to include only their religious references. Indeed, the only unifying element among the documents is their reference to God, the Bible, or religion. Furthermore, the display lacks an explanation of the documents' historical significance or of the reasons for their references to religion. Removed from their historical context and placed with other documents with which the only common link is religion, the documents have the undeniable effect of endorsing religion.

The defendants argue that the display cannot be held to violate the First Amendment because it includes excerpts from texts which have been held to be constitutional despite references to God or religion. They point specifically to this nation's motto of "In God We Trust" and the phrase "one nation under God" found in the Pledge of Allegiance. The defendants' argument, however, fails. First, as to several of the documents, the defendants did not include the entire text or even a meaningful section of each text. Rather, they narrowly extracted only the sections directly mentioning God. This effectively changed the meaning and significance of each of the documents from the original, particularly when read in conjunction with the rest of the Ten Commandments display. Second, and more generally, in upholding examples of ceremonial deism, such as the phrase "In God We Trust," courts have pointed to the long-standing existence of such phrases as well as their non-sectarian nature, concluding that "a reasonable observer, aware of the purpose, context, and history of the phrase ..., would not consider its use ... to be an endorsement of religion." *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d at 721-22 (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.1996)). *See*

Allegheny, 492 U.S. at 602-04, 109 S.Ct. 3086. Here, there is neither a long-standing tradition of posting the Ten Commandments in county courthouses nor any secular purpose for doing so. As the court has explained, a reasonable observer would conclude that the Ten Commandments display represents a governmental endorsement of religion, rather than merely a traditional manner of solemnizing a government meeting or giving a stamp of legitimacy to national currency. To the extent the defendants have invited this court to break with precedent and hold that the posting of the Ten Commandments should be viewed as only another example of ceremonial deism, the court declines to do so.

The defendants direct the court's attention to three cases in which other courts held Ten Commandments displays to be constitutional. All three of the cases are distinguishable from this case. In *Books v. City of Elkhart, Ind.*, 79 F.Supp.2d 979 (N.D.Ind.1999), the district court held that a fifty-eight-year-old stone monument containing, among other things, a copy of the Ten Commandments, did not violate the Establishment Clause. The monument was merely one of several historical and cultural plaques and memorials, all donated by private parties, standing on the edges of a city-owned lot, removed from government buildings. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.1973), considered an identical memorial, which it held to be constitutional. That opinion, however, has been called into question by the Tenth Circuit, which noted that it was decided before Stone and which commented that "more recent cases [cast] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Summum v. Callaghan*, 130 F.3d 906, 910 n. 10 (10th Cir.1997)(decided on grounds of freedom of speech). Here,

the Ten Commandments display is not in an area with other memorials and is not incorporated as part of a larger, secular sculpture or display. Furthermore, the court's holding in *Elkhart* that the Ten Commandments should be considered to be secular is by no means definitive in light of the Supreme Court's holding in *Stone*, and the holding in *Elkhart* was largely dependent upon the manner in which the Commandments were displayed, differing greatly from the Ten Commandments display here.

Similarly, in *Suhre v. Haywood County, N.C.*, 55 F.Supp.2d 384 (W.D.N.C.1999), the court held that a granite frieze in a courthouse did not violate the Establishment Clause. That sculpture recounted the historical development of the law, with images of "the blind Goddess of Justice, now called Lady Justice[,] ... ancient gods and goddesses, and the laws of Rome and the Tribes of Israel." *Id.* at 386. On either side of Lady Justice, who bears the Scales of Justice in one hand and holds the Sword of Justice in another, were two marble plaques bearing the Ten Commandments. The court noted that the courthouse had been entered into the National Register of Historic Places by the United States Department of the Interior, with special note paid to the sculpture, which could not be removed without its destruction. The court held that the purpose in sculpting the frieze was to display artistically the history of ethics, civilization, and the law, and that when viewed as a whole the sculpture did not communicate a governmental endorsement of religion. Again, the Ten Commandments display challenged here is not part of some larger artistic rendering or academic display encompassing a wide range of cultural, religious, and legal traditions. Instead, it is a narrowly tailored display, intended to convey and having the effect of conveying a very specific

governmental endorsement of religion.

The First Amendment will not permit such an endorsement, as "it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086, quoting *Lynch*, 465 U.S. at 688, 104 S.Ct. 1355. If the governmental display endorses religion then the constitutionally impermissible message must be removed, as it attacks this nation's "history and tradition of religious diversity that dates from the settlement of the North American Continent" and "the religious diversity that is our national heritage." *Id.* at 589, 109 S.Ct. 3086. Here, the display communicates a governmental endorsement not only of religion over non-religion, but of the particular religion, Christianity, [9] whose message is contained within the display. Both in the impetus for its creation and the manner in which it was assembled, the display evidences a governmental purpose and effect of endorsing Christianity, and therefore the display

[9] Notably, the defendants did not post a Hebrew version of the Ten Commandments and in selecting a version of the Ten Commandments had to choose among several differing translations, some favored by particular Christian sects over others. The other documents in the display reinforce its distinctly Christian theme. To the extent that the displayed version of the Ten Commandments may be favored by one sect over another, the display runs further afoul of the Establishment Clause because it infringes upon the "sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *Allegheny*, 492 U.S. at 589, 109 S.Ct. 3086.

violates the Establishment Clause of the First Amendment. Thus, the court concludes that the plaintiffs have shown a strong likelihood of success on the merits.

2. Irreparable Harm

The loss of First Amendment freedoms and the violation of an individual's First Amendment rights "for even minimal periods of time [ ] unquestionably constitute[ ] irreparable injury." *Connection Distrib.*, 154 F.3d at 288, citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). *See also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir.1995). Thus the plaintiffs here have shown that failure to grant the relief sought will result in their suffering irreparable harm.

3. Harm to Others

If the court grants the preliminary injunction sought by the plaintiffs, the defendants will be required to remove the religious display from the site upon which it is posted. This will require little expense. Should the defendants be successful at a trial on the merits, they may construct the display again at little expense.

The defendants argue that an order requiring the removal of the Ten Commandments and accompanying documents would infringe on their First Amendment right to free speech and would be tantamount to censorship. The defendants' concerns, however, are misplaced. Greene's official actions as McCreary County Judge Executive are distinguishable from those of private citizens. Greene's actions are subject to First Amendment scrutiny because he acted in his official

capacity as Judge Executive when he posted the Ten Commandments and later when he revised the display in the McCreary County Courthouse. The Establishment Clause of the First Amendment restricts the conduct of the government and its agents, not of private citizens. *Allegheny*, 492 U.S. at 590, 109 S.Ct. 3086. Thus, the action of a government official creating such an exhibit in a public area of a courthouse is analytically distinct from that of a private citizen who, for example, posts a copy of the Ten Commandments in his own home, in his front yard, or in his private business. The private citizen's actions do not implicate the Establishment Clause of the First Amendment. The speech at issue here was not that of private citizens, but of the government itself.[10] Thus, the removal of the display at issue here will not infringe upon the defendants' First Amendment free speech rights. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

Rather than limiting the religious speech of private citizens, the First Amendment ensures, in two separate ways, the freedom to engage in such speech and in doing so protects the public's interest. First, "private religious speech, far from being a First Amendment orphan, is as fully protected under

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[10] The court notes, however, that Greene and McCreary County cannot avoid the strictures of the Establishment Clause by allowing private citizens or religious organizations to post a Ten Commandments display in the courthouse. To do so would simply show "that the government is endorsing the religious message of that organization, rather than communicating a religious message of its own .... It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600, 109 S.Ct. 3086.

the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). Thus, the Free Speech Clause would, for example, preclude a county government from fining a private citizen for carrying a copy of the Ten Commandments or discussing the Ten Commandments with others. Second--and more central to the case at hand--the Establishment Clause guarantees that private citizens can think and speak freely on religious matters without fear of government coercion or penalty. Absent the Establishment Clause, a county government could pass an ordinance requiring all county residents to adhere to a certain religious sect or practice or to abstain from all religious acts. For example, the government could require all citizens to convert to islam on threat of imprisonment or could heavily fine anyone who entered a church. Clearly, such governmental conduct is at odds with the United States Constitution, which established this nation as a democracy, not as a theocracy. Subtler forms of government-sanctioned religious intolerance also serve to limit freedom of religious thought, speech, and practice and are therefore unconstitutional.

4. The Public Interest

As explained above, the protection of First Amendment rights and vindication of constitutional violations is always in the public's interest. *Connection Distrib.*, 154 F.3d at 288; *Dayton Area Visually Impaired*, 70 F.3d at 1490; *G & V. Lounge, Inc.*, 23 F.3d at 1079. Accordingly,

IT IS ORDERED that the plaintiffs' motion for a preliminary injunction is GRANTED.

IT IS FURTHER ORDERED that the defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the Ten Commandments display shall be removed from the McCreary County Courthouse IMMEDIATELY.

IT IS FURTHER ORDERED that neither the defendant Jimmie Greene nor any other McCreary County official, acting in their official capacity, shall erect or cause to be erected similar displays within McCreary County, Kentucky.

This is the 5th day of May 2000.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-509

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
PLAINTIFFS,
vs.
PULASKI COUNTY, KENTUCKY, et al.
DEFENDANTS.

ORDER

COFFMAN, District Judge.

This matter, which presents a First Amendment challenge to a display of the Ten Commandments and other documents,[1]

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[1] The subject display originally included only the Ten Commandments. Because the court here concludes that later modification of the exhibit was merely a futile attempt to render constitutional the original Ten Commandments display, that alteration was analytically meaningless when measured by the Establishment Clause of the First Amendment. The court thus uses interchangeably the terms "Ten Commandments display," "religious display," "display of the Ten Commandments and other documents," and similar phrases to describe the exhibit here at

is before the court upon the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss. This court held a hearing on April 20, 2000 and, having reviewed the arguments of counsel and being otherwise sufficiently advised, will grant the plaintiffs' motion for a preliminary injunction and will deny the defendants' motion to dismiss.[2]

Motion to Dismiss

For the reasons explained below, the plaintiffs have stated a claim for a First Amendment violation. The defendants also have raised two procedural grounds for their motion to dismiss, arguing that the plaintiffs lack standing to bring their claims and that they were ineffectually served.

The defendants contend that the plaintiffs lack standing to bring these actions because they have not alleged "injuries in fact." The injury-in-fact component of standing requires a plaintiff to have a personal stake in the matter to be

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issue.

[2] This is one of three companion cases, simultaneously filed, which attack such displays. Any minimal variances among the three displays possess no legal significance for the purpose of the motions now pending before the court. Having observed that the case records also share similar complaints, memoranda, and motions and that the three cases share identical lead counsel on both sides, the court combined the three for oral argument and today enters virtually identical opinions--with necessary but slight factual variations--in all three.

adjudicated. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The defendants correctly note that abstract or hypothetical injuries are insufficient. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The plaintiffs in this lawsuit, however, have suffered and are under the threat of suffering concrete injuries.

In *Washegesic v. Bloomingdale Public Sch.*, 33 F.3d 679, 683 (6th Cir.1994), the court considered a challenge to a public school's display of a portrait of Jesus. A former student was determined to have standing because he would come into unwelcome direct contact with the display while visiting the school to attend sporting events or meet former teachers. *Id.* The court held that even a member of the PTA or of the public would have standing if she attended events in the school and "took the portrait as a serious insult to her religious sensibilities." *Id.* Like the plaintiff in that case, the plaintiffs here have standing because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.

The defendants cite several Seventh Circuit cases holding that in order to have standing in an Establishment Clause challenge, a plaintiff must undertake a special burden or alter his or her normal routine to avoid the offensive object. In *Gonzales v. North Township of Lake County, Ind.*, 4 F.3d 1412 (7th Cir.1993), for example, the plaintiffs challenged the presence of a crucifix in their city's park. The plaintiffs' discontinued use of an area within the park conferred standing. *Id.* at 1417. Here, the plaintiffs have not specifically alleged that the display has forced them to alter their normal routines. The necessary alterations would be highly

impractical, however, because they must enter the courthouse to conduct civic business, and therefore the individual plaintiffs have met the standing requirement for their First Amendment claim.

The defendants' claim that the American Civil Liberties Union ("ACLU") lacks organizational standing likewise must be rejected. In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Supreme Court held:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 342, 97 S.Ct. 2434, quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here, the ACLU has members in Pulaski County who would have standing for the same reason that the named plaintiffs have standing. Furthermore, this lawsuit will not require the individual participation of ACLU members. Thus, the ACLU has organizational standing.

The defendants next claim that they were not properly served under Fed. R. Civ.P. 4. Rule 4(j)(2) provides that a county may be served "by serving the summons and complaint in the manner prescribed by law of that state for the service of summons." The Kentucky Rules of Civil Procedure allow a summons to be served by mail. Ky.R.Civ.P. 4.01(a). Under the Kentucky rule, the clerk of court actually mails the summons. Here, the plaintiffs placed the summons in the mail themselves, and the defendants argue that the service was ineffective because the clerk of court did not place the summons in the mail. The federal clerks of court do not, however, place summons in the mail for plaintiffs. The Federal Rules of Civil Procedure permit service "in the manner" allowed by their state counterparts--here, mailing. That the plaintiffs rather than a clerk of court mailed the summons does not render it ineffective. Accordingly, the defendants' motion to dismiss will be denied.

Preliminary Injunction

A preliminary injunction preserves the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). To receive a preliminary injunction, a plaintiff must establish: (1) a strong or substantial likelihood of success on the merits; (2) that he or she will suffer irreparable harm in the absence of an injunction; (3) that others will not suffer substantial harm if the injunction is granted; and (4) that an injunction will serve the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). These four factors guide the discretion of the court and are not unbending prerequisites. *Id.*

A party need not prove his case in full at a preliminary-injunction hearing. *Camenisch,* 451 U.S. at 395, 101 S.Ct. 1830. The court must, however, make findings of fact and conclusions of law, which are not binding at a trial on the merits, *United States v. Owens,* 54 F.3d 271, 277 (6th Cir.1995), when deciding a motion for a preliminary injunction. The court need not make specific findings of fact regarding each of the four factors if fewer are dispositive. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir.1994). In a case brought under the First Amendment, the likelihood of success on the merits frequently may be the determinative factor. *Connection Distrib.*, 154 F.3d at 288.

Findings of Fact

Pulaski County officials recently erected in the Pulaski County courthouse a Ten Commandments display, hung by the defendant Darrell Beshears, the Pulaski County Judge Executive. When this suit was filed, the display consisted of at least one framed copy of one version of the Ten Commandments and was not part of any larger educational, historical, or retrospective exhibit. After this lawsuit was filed, the defendants amended the display to include several other documents.[3] At oral argument, the defendants conceded that they did so in an attempt to bring the display within the

[3] The defendants argue that because they altered the display, theplaintiffs' complaint is moot. Their argument fails because the new display is effectively a continuation of the original display, and the plaintiffs raise the same objections to the amended display.

parameters of the First Amendment and to insulate themselves from suit. The display, both in its original form and as amended, is readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.

As it now exists,[4] the display consists of (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact. While some of the documents are

[4] At oral argument, it appeared that the original exhibit of the Ten Commandments was removed and replaced with the text of the Congressional Record which includes a copy of those Commandments. The exhibits attached to the defendants' brief, however, include a photograph of the Pulaski County Courthouse display in which the large framed copy of the Ten Commandments remains, with the other, smaller documents hanging to one side. For the purposes of this motion, either scenario produces the same result.

displayed in their entirety, the defendants have excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text.

Conclusions of Law

1. Likelihood Of Success On The Merits

The plaintiffs seek injunctive and declaratory relief under 42 U.S.C. § 1983, arguing that the continued posting of the Ten Commandments in the Pulaski County courthouse violates their First Amendment rights. Section 1983 creates a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. *See Conn v. Gabbert*, 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Section 1983 does not create separate substantive rights, but merely provides a method of vindicating independently conferred federal rights. *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). A plaintiff must allege two elements to establish a prima facie case under § 1983:(1) that the action occurred "under color of law"; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In a § 1983 case brought against a defendant in his official capacity, the governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation; thus, in an official-capacity suit, the entity's policy or custom must have played a part in the violation of federal law. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Here, the plaintiffs have shown a substantial likelihood of success on the merits for both elements required by a § 1983 claim. First, Darrell Beshears acted under color of state law[5] and in his capacity as County Judge Executive when he posted the Ten Commandments in the courthouse. Beshears possessed policy-making authority, so that his posting of the Ten Commandments constituted official Pulaski County policy. That policy serves as a driving force behind the constitutional violations alleged in this case. See Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Second, violations of the First Amendment such as those alleged in this case are remediable through a § 1983 claim. The First Amendment declares, "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend I. Pursuant to the Establishment Clause of the First Amendment, governmental bodies may not "take a position on questions of religious belief or [make] adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. ACLU*, 492

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[5] A § 1983 defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Indeed, Beshears's activities must be subjected to First Amendment scrutiny because in hanging the Ten Commandments in the courthouse, he acted as a public, government official, not as a private citizen. *See County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

U.S. 573, 594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)) (O'Connor, J., concurring). Government actions challenged under the Establishment Clause are reviewed under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under *Lemon*, the governmental action first must have a secular purpose and "second, its principal or primary effect must be one that neither advances nor inhibits religion." Finally, the governmental action must not result in "excessive governmental entanglement with religion." *Id.* at 612-13, 91 S.Ct. 2105. In the past decade, the Supreme Court has reframed the *Lemon* analysis, focusing on whether either the purpose or the effect of the challenged governmental action results in the endorsement of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Courts in this circuit treat the endorsement test as a refinement or clarification of the *Lemon* analysis, *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999), and this court will apply that test to decide whether the Ten Commandments display, both in its original form and as amended, passes constitutional muster.

The endorsement test forecloses governmental action that "a reasonable observer would think is an endorsement of religion by the government." *Id.* Justice O'Connor formulated the endorsement test, explaining:

> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring).[6] In other words, the challenged conduct must have both an actual secular purpose and also the effect of neither advancing nor hindering religion. Because the government's use of a religious reference or of an object with religious meaning may be appropriate under some circumstances but not in others, the court must assess the constitutionality of government conduct with careful attention to the manner and context of the action. *Compare Allegheny*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472, with *Lynch*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (display of creche held unconstitutional in former but constitutional in latter).

The purpose prong of the endorsement analysis asks whether a secular purpose actually motivated the government's action.

> In considering the purpose prong ... the focus of the inquiry is on the intentions of the government. Namely, did the government intend to convey a message of endorsement or disapproval of religion when it implemented the challenged policy. Courts should generally be deferential to the government's articulation of a secular purpose. The government's secular purpose, however, must be sincere and not a

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[6] The endorsement test was adopted by a majority of the Court in *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086.

> mere sham. Although the government's purpose need not be exclusively secular, a practice will violate the Establishment Clause if it is entirely motivated by a purpose to advance religion.

Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 384 (6th Cir.1999), citing *Edwards v. Aguillard*, 482 U.S. 578, 585-86, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Lynch*, 465 U.S. at 681 n. 6, 104 S.Ct. 1355; *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). *See Granzeier*, 173 F.3d at 574. Here, the court will look to the County's proffered purpose, the brief history of the Ten Commandments display, and the display itself to determine whether the display serves an actual, secular purpose.

In its original form, the Ten Commandments display, consisting only of the Commandments unaccompanied by any other documents, lacks any secular purpose. The Ten Commandments are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God, and their very nature precludes a finding of a prevailingly secular purpose here. Indeed, "the pre-eminent purpose for posting the Ten Commandments ... is plainly religious in nature." *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).[7]

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[7] While the defendants suggest that *Stone* is inapplicable here because it dealt with legislative action and declared the posting of the Ten Commandments to be unconstitutional without the benefit of full briefing, it nevertheless is still good law and this court is bound by its precedential value. The court cites the case today merely to establish that the Ten Commandments are a distinctly religious text and that their posting has a religious

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21.. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15.

Id. at 41-42, 101 S.Ct. 192. In their briefs and at oral argument, the defendants suggest that the Ten Commandments were posted in order to teach Pulaski County residents about American religious history and the foundations of the modern state. The defendants also concede that the display purports to demonstrate America's Christian heritage.[8] The narrow scope of the display--a single religious

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purpose.

[8] Such an overtly Christian purpose violates the Establishment clause. While the court recognizes that the Christian tradition has played an important role in American culture, the defendants' reliance on *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), is misplaced. In that case, the Supreme Court examined whether a service contract between an incorporated church and a foreign minister fell within the purview of a statute regulating the import of foreign laborers. The Court's analysis focused upon and delineated rules of statutory construction and did not entail First Amendment jurisprudence. Indeed, the language cited by the

text unaccompanied by any interpretation explaining its role as a foundational document--can hardly be said to present meaningfully the story of this country's religious traditions, and for this court to conclude that the original display had a secular purpose belies reason.

The challenged display now includes other documents which the defendants argue illustrate the display's secular purpose: the education of Pulaski County residents concerning American religious history. As the Supreme Court has made abundantly clear in its articulation of the endorsement test, the court must examine the actual purpose of the use of the religious objects and should not blindly accept an allegedly secular purpose which is contrary to the facts of the case. Furthermore, the requirement of a secular purpose "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691, 104 S.Ct. 1355 (O'Connor, J., concurring). While the government's stated purpose may be entitled to some deference, the history of the display here and the choice of documents in the display contradict the County's assertion. That the display originally consisted solely of the Ten Commandments and that it was altered--albeit without any legally significant change--only after this lawsuit was filed weigh heavily against the finding of a secular purpose.

Likewise, a review of the documents themselves forecloses a characterization of the purpose of the display as

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defendants is dicta and is neither that Court's ruling nor vital to its ruling.

secular. The County narrowly tailored its selection of foundational documents to incorporate only those with specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references. The display does not appear to have been intended to educate Pulaski County residents, in a balanced or accurate manner, about the traditions and texts that were drawn upon by this nation's founders or about the complex role religion has played in this country's history. In short, as shown by the facts of the case and the display itself, the exhibit--both in its original form and as altered--serves no secular purpose, nor was it ever intended to do so. As the display clearly lacks a secular purpose, it violates the First Amendment and the court's analysis need go no further. *See Wallace*, 472 U.S. at 56, 105 S.Ct. 2479. The court, however, will complete the *Lemon* analysis to determine whether the effect of the display also violates the Establishment Clause.

In determining such an effect, the court must ask whether an objective observer acquainted with the display would perceive it as a governmental endorsement of religion. *See ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703 (6th Cir.2000). The objective-observer standard parallels the reasonable-person standard in torts law; the question is not whether one particular, uninformed, subjective observer would view the display as an endorsement of religion but whether an objective, knowledgeable, reasonable observer would do so. Here, the prevailing effect of the display is one of governmental endorsement of religion.

The overriding theme of each individual document as presented in the display and of the display as a whole is one of religion and more specifically of Christianity. The first

document is a copy of the Congressional Record from February 2, 1983, proclaiming that year the Year of the Bible and reflecting the remarks of Representative Phillip M. Crane about his personal beliefs concerning the importance of the Bible and the Ten Commandments, a version of which is included in the remarks. The next document consists of two brief excerpts: one from the Declaration of Independence, "All men ... are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and one from the Constitution of Kentucky, "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution." The next document is President Lincoln's Proclamation of a Day of Prayer. Issued in 1863, it confesses to God and seeks forgiveness for the national sins committed during the Civil War. Another presidential proclamation follows, from President Reagan, declaring 1983 the Year of the Bible in honor of its influence in shaping America. A copy of the Mayflower Compact follows, in which the colony's founders invoke "the name of God" and explain that their journey was taken, among other reasons, "for the glory of God and advancement of the Christian faith." Finally, bearing a picture of Abraham Lincoln, the next states, "The Bible is the best gift God has ever given to man."

While a display of some of these documents may not have the effect of endorsing religion in another context, they collectively have the overwhelming effect of endorsing religion, in the context of this display. No reasonable observer of the display could conclude otherwise. Each and every document refers to religion. Several have been edited to

include only their religious references. Indeed, the only unifying element among the documents is their reference to God, the Bible, or religion. Furthermore, the display lacks an explanation of the documents' historical significance or of the reasons for their references to religion. Removed from their historical context and placed with other documents with which the only common link is religion, the documents have the undeniable effect of endorsing religion.

The defendants argue that the display cannot be held to violate the First Amendment because it includes excerpts from texts which have been held to be constitutional despite references to God or religion. They point specifically to this nation's motto of "In God We Trust" and the phrase "one nation under God" found in the Pledge of Allegiance. The defendants' argument, however, fails. First, as to several of the documents, the defendants did not include the entire text or even a meaningful section of each text. Rather, they narrowly extracted only the sections directly mentioning God. This effectively changed the meaning and significance of each of the documents from the original, particularly when read in conjunction with the rest of the Ten Commandments display. Second, and more generally, in upholding examples of ceremonial deism, such as the phrase "In God We Trust," courts have pointed to the long-standing existence of such phrases as well as their non-sectarian nature, concluding that "a reasonable observer, aware of the purpose, context, and history of the phrase ..., would not consider its use ... to be an endorsement of religion." *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 721, quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.1996). *See Allegheny*, 492 U.S. at 602-04, 109 S.Ct. 3086. Here, there is neither a long-standing tradition of posting the Ten

Commandments in county courthouses nor any secular purpose for doing so. As the court has explained, a reasonable observer would conclude that the Ten Commandments display represents a governmental endorsement of religion, rather than merely a traditional manner of solemnizing a government meeting or giving a stamp of legitimacy to national currency. To the extent the defendants have invited this court to break with precedent and hold that the posting of the Ten Commandments should be viewed as only another example of ceremonial deism, the court declines to do so.

The defendants direct the court's attention to three cases in which other courts held Ten Commandments displays to be constitutional. All three of the cases are distinguishable from this case. In *Books v. City of Elkhart, Ind.*, 79 F.Supp.2d 979 (N.D.Ind.1999), the district court held that a fifty-eight-year-old stone monument containing, among other things, a copy of the Ten Commandments, did not violate the Establishment Clause. The monument was merely one of several historical and cultural plaques and memorials, all donated by private parties, standing on the edges of a city-owned lot, removed from government buildings. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.1973), considered an identical memorial, which it held to be constitutional. That opinion, however, has been called into question by the Tenth Circuit, which noted that it was decided before Stone and which commented that "more recent cases [cast] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Summum v. Callaghan*, 130 F.3d 906, 910 n. 10 (10th Cir.1997)(decided on grounds of freedom of speech). Here, the Ten Commandments display is not in an area with other memorials and is not incorporated as part of a larger, secular

sculpture or display. Furthermore, the court's holding in Elkhart that the Ten Commandments should be considered to be secular is by no means definitive in light of the Supreme Court's holding in *Stone*, and the holding in *Elkhart* was largely dependent upon the manner in which the Commandments were displayed, differing greatly from the Ten Commandments display here.

Similarly, in *Suhre v. Haywood County, N.C.*, 55 F.Supp.2d 384 (W.D.N.C.1999), the court held that a granite frieze in a courthouse did not violate the Establishment Clause. That sculpture recounted the historical development of the law, with images of "the blind Goddess of Justice, now called Lady Justice[,] ... ancient gods and goddesses, and the laws of Rome and the Tribes of Israel." *Id.* at 386. On either side of Lady Justice, who bears the Scales of Justice in one hand and holds the Sword of Justice in another, were two marble plaques bearing the Ten Commandments. The court noted that the courthouse had been entered into the National Register of Historic Places by the United States Department of the Interior, with special note paid to the sculpture, which could not be removed without its destruction. The court held that the purpose in sculpting the frieze was to display artistically the history of ethics, civilization, and the law, and that when viewed as a whole the sculpture did not communicate a governmental endorsement of religion. Again, the Ten Commandments display challenged here is not part of some larger artistic rendering or academic display encompassing a wide range of cultural, religious, and legal traditions. Instead, it is a narrowly tailored display, intended to convey and having the effect of conveying a very specific governmental endorsement of religion.

The First Amendment will not permit such an endorsement, as "it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086, quoting *Lynch*, 465 U.S. at 688, 104 S.Ct. 1355. If the governmental display endorses religion then the constitutionally impermissible message must be removed, as it attacks this nation's "history and tradition of religious diversity that dates from the settlement of the North American Continent" and "the religious diversity that is our national heritage." *Id.* at 589, 109 S.Ct. 3086. Here, the display communicates a governmental endorsement not only of religion over non-religion, but of the particular religion, Christianity,[9] whose message is contained within the display. Both in the impetus for its creation and the manner in which it was assembled, the display evidences a governmental purpose and effect of endorsing Christianity, and therefore the display violates the Establishment Clause of the First Amendment. Thus, the court concludes that the plaintiffs have shown a

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[9] Notably, the defendants did not post a Hebrew version of the Ten Commandments and in selecting a version of the Ten Commandments had to choose among several differing translations, some favored by particular Christian sects over others. The other documents in the display reinforce its distinctly Christian theme. To the extent that the displayed version of the Ten Commandments may be favored by one sect over another, the display runs further afoul of the Establishment Clause because it infringes upon the "sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *Allegheny*, 492 U.S. at 589, 109 S.Ct. 3086.

strong likelihood of success on the merits.

2. Irreparable Harm

The loss of First Amendment freedoms and the violation of an individual's First Amendment rights "for even minimal periods of time [ ] unquestionably constitute[ ] irreparable injury." *Connection Distrib.*, 154 F.3d at 288, citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). *See also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir.1995). Thus the plaintiffs here have shown that failure to grant the relief sought will result in their suffering irreparable harm.

3. Harm to Others

If the court grants the preliminary injunction sought by the plaintiffs, the defendants will be required to remove the religious display from the site upon which it is posted. This will require little expense. Should the defendants be successful at a trial on the merits, they may construct the display again at little expense.

The defendants argue that an order requiring the removal of the Ten Commandments and accompanying documents would infringe on their First Amendment right to free speech and would be tantamount to censorship. The defendants' concerns, however, are misplaced. Beshears's official actions as Pulaski County Judge Executive are distinguishable from those of private citizens. Beshears's actions are subject to First Amendment scrutiny because he acted in his official capacity as Judge Executive when he posted the Ten Commandments and later when he revised the display in the

Pulaski County Courthouse. The Establishment Clause of the First Amendment restricts the conduct of the government and its agents, not of private citizens. *Allegheny*, 492 U.S. at 590, 109 S.Ct. 3086. Thus, the action of a government official creating such an exhibit in a public area of a courthouse is analytically distinct from that of a private citizen who, for example, posts a copy of the Ten Commandments in his own home, in his front yard, or in his private business. The private citizen's actions do not implicate the Establishment Clause of the First Amendment. The speech at issue here was not that of private citizens, but of the government itself.[10] Thus, the removal of the display at issue here will not infringe upon the defendants' First Amendment free speech rights. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

Rather than limiting the religious speech of private citizens, the First Amendment ensures, in two separate ways, the freedom to engage in such speech and in doing so protects the public's interest. First, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."

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[10] The court notes, however, that Beshears and Pulaski County cannot avoid the strictures of the Establishment Clause by allowing private citizens or religious organizations to post a Ten Commandments display in the courthouse. To do so would simply show "that the government is endorsing the religious message of that organization, rather than communicating a religious message of its own.... It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600, 109 S.Ct. 3086.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). Thus, the Free Speech Clause would, for example, preclude a county government from fining a private citizen for carrying a copy of the Ten Commandments or discussing the Ten Commandments with others. Second--and more central to the case at hand--the Establishment Clause guarantees that private citizens can think and speak freely on religious matters without fear of government coercion or penalty. Absent the Establishment Clause, a county government could pass an ordinance requiring all county residents to adhere to a certain religious sect or practice or to abstain from all religious acts. For example, the government could require all citizens to convert to Islam on threat of imprisonment or could heavily fine anyone who entered a church. Clearly, such governmental conduct is at odds with the United States Constitution, which established this nation as a democracy, not as a theocracy. Subtler forms of government-sanctioned religious intolerance also serve to limit freedom of religious thought, speech, and practice and are therefore unconstitutional.

4. The Public Interest

As explained above, the protection of First Amendment rights and vindication of constitutional violations is always in the public's interest. *Connection Distrib.*, 154 F.3d at 288; *Dayton Area Visually Impaired*, 70 F.3d at 1490; *G & V Lounge, Inc. v. Michigan Liquor Control*, 23 F.3d 1071, 1079 (6th Cir.1994). Accordingly,

IT IS ORDERED that the plaintiffs' motion for a preliminary injunction is GRANTED.

IT IS FURTHER ORDERED that the defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the Ten Commandments display shall be removed from the Pulaski County Courthouse IMMEDIATELY.

IT IS FURTHER ORDERED that neither the defendant Darrell Beshears nor any other Pulaski County official, acting in their official capacity, shall erect or cause to be erected similar displays within Pulaski County, Kentucky.

This is the 5th day of May 2000.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 01-5935

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

PLAINTIFFS-APPELLEES,

V.

MCCREARY COUNTY, KENTUCKY, ET AL.

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
Filed: March 23, 2004
Before: RYAN, CLAY, and GIBBONS, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original

panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CLAY, Circuit Judge, concurring in denial of rehearing en banc, joined by Martin, J.

In *Stone v. Graham*, 449 U.S. 39 (1980)(per curiam), the Supreme Court held that it was patently insufficient for the government to justify schoolhouse displays of the Ten Commandments merely by asserting that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 40 n.1. The Court reasoned that posting the Ten Commandments with only this disclaimer served no "educational function." *Id.* at 42.

The Court further opined that the display may have been permissible had the Ten Commandments been "integrated into the school curriculum...in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* (citation omitted). This statement was a critical component of the Court's holding. Indeed, the Supreme Court expressly endorsed this statement in *Lynch v. Donnelly*, 465 U.S. 668 (1984). *See id.* at 679 (expressing approval of Stone and noting that the Stone decision "carefully pointed out that the Commandments were posted purely as a religious admonition, not 'integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like'") (quoting *Stone*, 449 U.S. at 442.). The Court further elaborated that study of the Bible or of religion, "'when presented objectively as part of a secular program of education,'" may be effected consistently with the First Amendment. *Id.* at 679-80 (quoting *Abbington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).[1] Thus, both *Stone* and *Lynch* support the view that the government's presentation of the Ten Commandments, or religious messages generally, is constitutional so long as the religious messages are presented objectively and as an integral component of an overarching secular subject matter.

[1] The Court also discussed *Stone* with approval in *County of Allegheny v. ACLU*, 492 U.S. 573, 590-91 n.40 (1989) ("[T]he content of a public school's curriculum may not be based on a desire to promote religious beliefs....For the same reason, posting the Ten Commandments on the wall of a public-school classroom violates the Establishment Clause.") (citing *Stone*, *supra*; other citations omitted).

This view is manifested even in those Supreme Court decisions upholding governmental displays containing patently religious symbols, including the cases cited by the dissent – *Lynch*, supra, and *County of Allegheny v. ACLU*, supra.[2] *Lynch* approved of a Christmastime display of a creche because that symbol, as a matter of fact in that case, shared a common secular link – the holiday season – with the numerous other secular symbols included in the display. The display was permissible because the secular connection between the symbols rendered "indirect, remote and incidental" the religious message that the creche would have conveyed standing alone. *Lynch*, 465 U.S. at 683. Consistently, the Court struck down a creche display in *County of Allegheny* because the creche was the display's solitary element. *County of Allegheny*, 492 U.S. at 599 (holding that "nothing in the context of the display detracts from the creche's religious message"). In contrast, through a series of fractured opinions, a majority of the Court in *County of Allegheny* approved the display of a menorah, alongside a Christmas tree and an explanatory sign, because the overall theme conveyed by the display was one of diversity, secularism, the holiday season and/or freedom. These decisions demonstrate that the manner in which a display's

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[2] The dissent's citation to *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) is baffling. That case is irrelevant because, there, the display of a cross involved private speech, not government speech as in the case at bar. *Id.* at 760, 765 ("There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotation marks, punctuation and citation omitted).

religious and secular elements integrate with one another is highly relevant to the inquiry concerning the government's purpose behind the display.[3]

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[3] A hypothetical from Justice Stevens illustrates how the thematic integration of the Ten Commandments with secular symbols or messages, or the lack thereof, can render a display containing the Ten Commandments religious or non-religious in nature:

> ... [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." *See* post [492 U.S. at 661] (KENNEDY, J., concurring in judgment in part and dissenting in part). *Cf. Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam). Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum. *Cf. Lynch*, 465 U.S., at 712-713, 717, 104 S. Ct., at 1379-1380, 1382 (BRENNAN, J., dissenting).

Using this approach, the panel concluded that the documents and symbols in Defendants' displays utterly lacked a unifying secular theme. The dissent has not disputed this conclusion. Under *Stone*, Defendants' mere assertion of such a unifying theme did not render the displays' purpose secular. Moreover, neither Defendants' displays, nor their legal briefs, provided a shred of evidence to support the principal assertion in the courthouse displays that the Ten Commandments profoundly influenced the drafting of the Declaration of Independence. Defendants' schoolhouse displays did not even purport to cite to objective historical evidence, instead relying on the Harlan County School Board's subjective "belief" and "opinion" that the displays will "positively contribute to the …moral character of students" and "instill qualities desirable of the students in [their] schools." Like the display of the Ten Commandments in *Stone*, the schoolhouse displays, as a matter of fact, served no educational mission, as might have been the case had the Ten Commandments been integrated into the objective study of a secular subject matter. Defendants' posting of the Ten Commandments served no purpose but as a religious admonition. Accordingly, the content of the displays sufficiently demonstrated that Defendants' true purpose for the displays was religious.

The dissent suggests that as long as the Ten Commandments are displayed "as part of an array containing eight or nine otherwise secular, historical documents," further inquiry into Defendants' purpose must cease. This is wrong.

County of Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring, in part, and dissenting, in part).

Neither the Supreme Court nor this Court has ever adopted such a facile approach to the Establishment Clause. The determination of an Establishment Clause violation is a highly fact-specific inquiry that requires a court to pay careful attention to the content and context of the display containing a religious symbol. *See, e.g., County of Allegheny*, 492 U.S. at 597 (stating that the Court's task was "to determine whether the display of the creche and the menorah, in their respective 'particular physical settings,'" has the effect of endorsing or disapproving religious beliefs"); *Adland v. Russ*, 307 F.3d 471, 481 (6th Cir. 2002) (looking at the "intended physical context" of the Ten Commandments display). The dissent's approach would require courts to ignore disingenuous governmental attempts to convey religious messages whenever it has included secular elements in its speech, no matter how unrelated those secular elements are to the religious elements. If followed to its logical conclusion, the dissent's approach would justify a classroom display of a crucifix or the Lord's Prayer, so long as surrounded by the Magna Carta, the Declaration of Independence, the Star Spangled Banner and, perhaps, excerpts from the Internal Revenue Code.

The dissent inaccurately refers to the panel's "sympathetic treatment of the district court's conclusion that the history of the defendants' earlier attempts to erect 'constitutionally invalid displays' had "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]"" (quoting *ACLU v. McCreary County*, 354 F.3d 438, 457 (6th Cir. 2003) (quoting *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 850 (E.D. Ky. 2001)). In fact, the panel explicitly rejected the district court's heavy reliance on past conduct, instead concluding that "the history of Defendants'

involvement with the displays strongly indicated that the primary purpose was religious." *McCreary County*, 354 F.3d at 348 (emphasis added; disagreeing with the district court's decision "to afford exclusive weight to Defendants' past conduct without addressing the specific content of the revised displays"). Although not dispositive of the issue, Defendants' prior unconstitutional conduct (initially displaying the Ten Commandments alone, in clear violation of *Stone*, then subsequently displaying the Ten Commandments alongside documents excerpted solely for their religious content), combined with the fact that Defendants added secular material only after this litigation ensued, was relevant evidence of their purpose behind the displays' final iteration.[4] A careful reading of the panel's opinion does not support the dissent's attempt to conjure a conflict with *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999).

Finally, the dissent argues that "the lead opinion erroneously applies the heightened Establishment Clause standards for public schools to other public buildings such as courthouses." This argument is incorrect and misleading. First, the discussion of the public school and courthouse settings appeared in my separate discussion of the "endorsement" prong of the three-part test under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Judge Gibbons did not join this aspect of my opinion and, therefore, the discussion was not adopted by a majority of the panel. It would have been

[4] This holding was justified by *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309, 315 (2000) (looking at the "evolution" of the student-led prayer policy to determine whether an Establishment Clause violation had occurred).

inappropriate for the entire Court to review this non-binding opinion.

Second, my opinion did not equate the public school and courthouse settings for all Establishment Clause purposes. Rather, the opinion observed that citizens typically conduct business at a courthouse by necessity, many times subject to the coercive powers of the court, and, therefore, they are a captive audience, similar to public school students, who are subject to mandatory attendance requirements. Further, the fact that a courthouse is so plainly the seat of government requires courts to exercise special care to ensure that a governmental display containing religious symbols is not tantamount to governmental endorsement of those symbols. *See McCreary County*, 354 F.3d at 461.

Third, my opinion never suggested that the same concerns about governmental coercion and endorsement apply to all public buildings. As the authorities cited above hold, the inquiry into an alleged Establishment Clause violation is a highly fact-specific inquiry that depends, in part, on the particular physical setting of the speech at issue. I expressed no opinion about a display containing the Ten Commandments outside of a public school or a courthouse.

For the foregoing reasons, I concur in the decision of the en banc Court denying review of the panel opinion.

BOGGS, Chief Judge, dissenting from the denial of rehearing en banc, joined by Batchelder, J. The core question in this case is whether the district court and the panel majority

erred in holding, as a matter of law, that despite the statement of historical and patriotic secular purpose included in each display at issue here, and despite the five separate secular purposes for the displays articulated by the defendants in the district court, they nonetheless have an essentially religious purpose because the Ten Commandments appear beside eight or nine otherwise indisputably secular documents.

This court has held that in Establishment Clause cases federal courts must defer to the government's articulation of a secular purpose unless the stated purpose is shown to be a "sham." *Chaudhuri v. Tenn.*, 130 F.3d 232, 236 (6th Cir. 1997). That rule has been misapplied by the panel majority.

In coming to the conclusion that the defendants' carefully articulated secular purposes are a sham, the court ignores the First Amendment principles laid out in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984). It establishes a new and heightened standard of proof, holding that the displays lacked a secular purpose because they "provided the viewer with no analytical or historical connection between the Ten Commandments and the other historical documents." *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 453 (6th Cir. 2003). Neither the Supreme Court nor this court has ever adopted such a standard. On the contrary, the Supreme Court has upheld displays of a cross, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion), a creche, *Lynch*, 465 U.S. 668, and a menorah, *County of Allegheny*, 492 U.S. 573, none of which made explicit an "analytical or historical connection" between the religious item and other, secular items in the displays.

The implication of the court's decision is that the presence of the Ten Commandments, in an array containing indisputably historical and patriotic secular documents, converts the whole into a display having a primarily religious purpose. The panel majority appears to have drawn this rule from *Stone v. Graham*, 449 U.S. 39 (1980), a brief, per curiam disposition that preceded both *Lynch* and *Donnelly*, and that bears no meaningful factual resemblance to this case. *Stone* struck down a Kentucky statute that mandated the posting of the Ten Commandments, standing alone, in every classroom in the Commonwealth. In dicta, the Court stated that the Ten Commandments "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42 (citing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963)) (emphasis added). I do not believe this language can be read as an attempt to state binding limits on all future constitutionally valid displays. And even if it were to be read in that aggressive fashion, *Stone* certainly does not suggest that a display that includes the Ten Commandments as part of an array containing eight or nine otherwise secular, historical documents, violates the First Amendment unless the display also provides an explicit analytical or historical connection between the clearly secular and the arguably religious items.

Another troubling aspect of the majority opinion concerns its sympathetic treatment of the district court's conclusion that the history of the defendants' earlier attempts to erect "constitutionally invalid displays" had "'imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]'" *McCreary County*, 354 F.3d at 457 (quoting *ACLU of Ky. v, McCreary County*, 145 F. Supp. 2d 845, 850 (E.D. Ky. 2001)). I think the history of the

defendants' displays is entitled to considerably less weight than the majority gives it. Our court has previously expressed great reluctance to allow a government's past actions to taint its future actions from the standpoint of the Establishment Clause. In *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), we held that the government could close its offices on Good Friday without violating the Establishment Clause by adopting a "spring weekend" rationale, even though there was evidence that the government's purpose was originally religious, including a poster put up by a government employee depicting the Crucifixion. We stated that "the fact that a particular closing was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Id.* at 574. Our holding in *Granzeier* reflects an important principle of equal treatment that is slighted by the panel's opinion. In general, governmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law.[5]

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[5] The holding and reasoning of *Granzeier* are consistent with the Supreme Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), relied upon by the panel. While the *Santa Fe* majority considered both the "text and history" of the school policy at issue in that case, which authorized a student-elected speaker to make an "invocation" to "solemnize" home football games, *id.* at 298 & n.6, 315, it also made clear that the policy was, in fact, invalid on its face. *Id.* at 306-07, 314-15; *see id.* at 315 ("The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny."). Moreover, the evidence of a "continuous" Establishment Clause violation, as well as other troubling aspects of the case's history, were far stronger in *Santa Fe* than in this case, where the counties have seriously rethought and reorganized their displays in response to constitutional concerns. *Cf. id.* at 294-98 (detailing various cosmetic alterations made to school district's longstanding policy of pregame and graduation prayers, which were frequently explicitly Christian in nature; also noting that the record suggested that there had been official harassment and intimidation of the Santa Fe plaintiffs during the litigation).

Finally, the lead opinion erroneously applies the heightened Establishment Clause standards for public schools to other public buildings such as courthouses. *See McCreary County*, 354 F.3d at 461. This ignores the reasons given by the Supreme Court for creating a heightened constitutional standard in public schools, namely that young children are impressionable and that the state exercises coercive power through mandatory school attendance requirements. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). By applying these heightened requirements to courthouses and other public buildings, the lead opinion not only misapplies the law, it also invites a new round of First Amendment challenges to religious texts and symbols that are nearly ubiquitous in non-schoolhouse public buildings throughout the nation, particularly courthouses.

The court's decision, that the Ten Commandments' text is impermissible as one of ten otherwise secular documents, gives no further guidance. Would it be permissible as one of twenty other texts, or one of one hundred? Would it make a difference if the display involved a pictorial representation, rather than a text?

I have seen at one institution what seemed to me a possible solution to some controversies of this type. There was a

representation of two tablets, bearing only the Roman numerals from "I" to "X." This left it to all observers to decide what exact text they wished to impose on that symbol. But under the court's decision, I have no idea if even this display could pass muster.

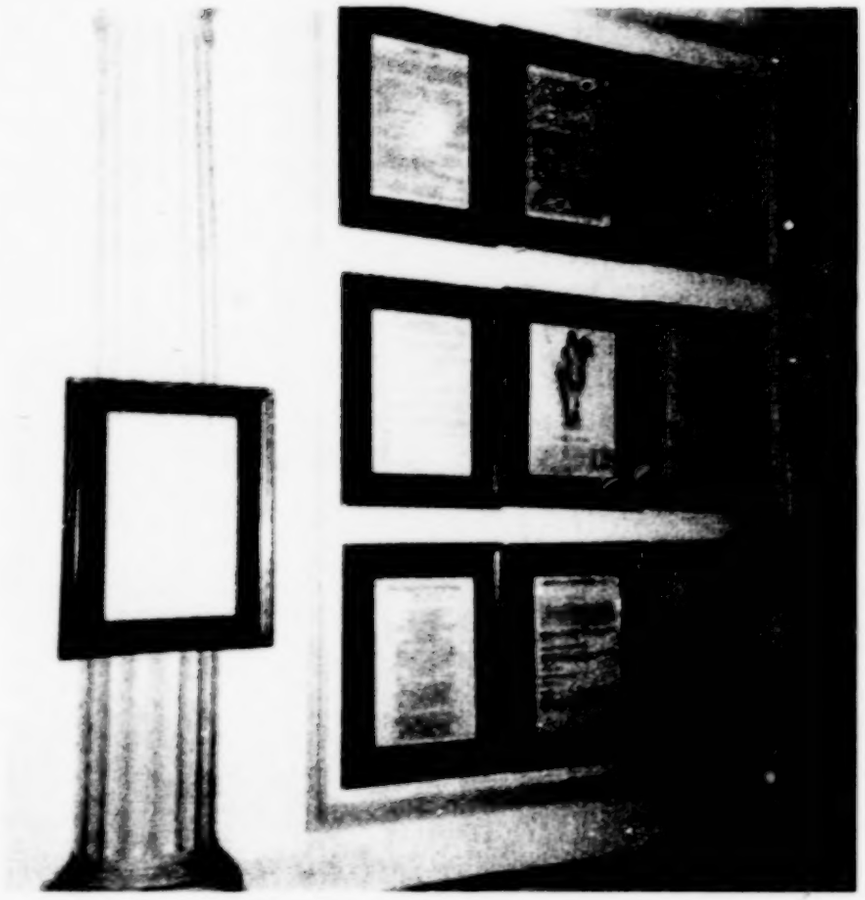
Believing the panel's decision to be both draconian and legally unsupported, I would rehear this case, so that the full court could give it more nuanced consideration. I therefore respectfully dissent from the denial of rehearing en banc.

APPENDIX F

McCREARY COUNTY DISPLAY

APPENDIX G

PULASKI COUNTY DISPLAY



APPENDIX I

EXPLANATION OF DISPLAY IN McCREARY AND PULASKI COUNTIES

FOUNDATIONS OF AMERICAN LAW AND GOVERNMENT DISPLAY

The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government. The Display contains (1) The Mayflower Compact; (2) The Declaration of Independence; (3) The Ten Commandments; (4) The Magna Carta; (5) The Star Spangled Banner; (6) The National Motto of the United States of America; (7) The Preamble to the Kentucky Constitution; (8) The Bill of Rights to the United States Constitution, and; (9) A picture of Lady Justice.

The Mayflower Compact

The Mayflower Compact was penned by William Bradford on November 11, 1620 on the Mayflower before the Pilgrims made landfall at Plymouth, Massachussetts. The Compact was the first written constitution in the New World. William Bradford described the reasoning behind the Compact when he stated in the Compact, "This day, before we came to harbour, observing some not well affected to unity and concord, but gave some appearance of faction, it was thought good there should be an association and agreement, that we should combine together in one body, and to submit to such government and governors as we should by common consent agree to make and choose, and set our hands

to this that follows, word for word. . ."

The Declaration of Independence

Perhaps the single most important document in American History, The Declaration of Independence was, as Abraham Lincoln stated, the "frame" into which the Framers placed the Constitution. The Declaration's fundamental premise is that one's right to "Life, Liberty, and the pursuit of Happiness" is not a gift of government. Government is not a giver of rights, but a protector of God-given rights. Moreover, government is a creation of "the governed" and derives all its power from the consent of its people. As the Preamble to the United States Constitution states, "We the People" *are* the government.

The Ten Commandments

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

The Magna Carta

In 1215, King John of England consented to the demands of his barons and agreed for Magna Carta to be publicly read

throughout the land. By this act he bound himself and "his heirs, for ever" to grant to the people of his kingdom the rights pronounced in Magna Carta. By signing Magna Carta, King John brought himself and England's future rulers within the rule of law. The rule of law places a restraint on the exercise of arbitrary government power, and it places all people and civil government under law. The American patriots, therefore, waged war against England to preserve liberties originating in 13th century England. A distinction, however, is noted between Magna Carta and the American concept of liberty. While Magna Carta is a guarantee from a king that he will follow the law, the Constitution of the United States is the establishment of a government consisting of, and created for, "We the People."

The Star Spangled Banner

Guarding the entrance to Baltimore harbor via the Patapsco River during the War of 1812, Fort McHenry faced almost certain attack by British forces. Major George Armistead, the stronghold's commander, was ready to defend the fort, but he wanted a flag that would identify his position, and one whose size would be visible to the enemy from a distance. The flag that was made for the Fort was 30 feet by 42 feet. Anxiously awaiting news of the battle's outcome was a Washington, D.C., lawyer named Francis Scott Key. Key had visited the enemy's fleet to secure the release of a Maryland doctor, who had been abducted by the British after they left Washington. The lawyer had been successful in his mission, but he could not escort the doctor home until the attack ended. So he waited on a flag-of-truce sloop anchored eight miles downstream from Fort McHenry.

During the night, there had been only occasional sounds of the fort's guns returning fire. At dawn, the British bombardment tapered off. Had the fort been captured? Placing a telescope to his eye, Key trained it on the fort's flagpole. There he saw the large garrison flag catch the morning breeze. It had been raised as a gesture of defiance, replacing the wet storm flag that had flown through the night. Thrilled by the sight of the flag and the knowledge that the fort had not fallen, Key took a letter from his pocket, and began to write some verses on the back of it. Later, after the British fleet had withdrawn, Key checked into a Baltimore hotel, and completed his poem on the defense of Fort McHenry. He then sent it to a printer for duplication on handbills, and within a few days the poem was put to the music of an old English song. Both the new song and the flag became known as "The Star-Spangled Banner" and became a rallying cry for the American Patriots during the Revolutionary War.

The National Motto

The motto was derived from the line "And this be our motto, 'In God is our trust,'" in the U.S. National Anthem, "The Star-Spangled Banner." The phrase first appeared on U.S. coins in 1864 and became obligatory on all U.S. currency in 1955. In accordance with Public Law Number 851 passed at the Second Session of the 84th Congress of the United States, July 30, 1956, the National Motto of the United States became "In God we Trust."

The Preamble to the Kentucky Constitution

The Preamble to the Kentucky Constitution derives

directly from the idea that Government is not a giver of rights, but a protector of God-given rights. Moreover, government is a creation of "the governed" and derives all its power from the consent of its people. The people, therefore, desiring a civilized society, created and ordained the Constitution of the State of Kentucky.

The Bill of Rights to the United States Constitution

During the debates on the adoption of the Constitution, its opponents repeatedly charged that the Constitution as drafted would open the way to tyranny by the central government. Fresh in their minds was the memory of the British violation of civil rights before and during the Revolution. They demanded a "bill of rights" that would spell out the immunities of individual citizens. Several state conventions in their formal ratification of the Constitution asked for such amendments; others ratified the Constitution with the understanding that the amendments would be offered. The Bill of Rights is still a vital and powerful force in American Government, shaping our laws and serving as a check on the exercise of government power.

Lady Justice

Lady Justice has become a symbol of the fair and equal administration of the law, without corruption, avarice, prejudice, or favor. The blindfold represents that our system of justice is blinded to all prejudices or favor. The scales represent that justice is administered fairly and the sword represents justice that is authoritative. Lady Justice is a symbol of the American system of justice and the ideals it embodies.

APPENDIX J
HISTORICAL DOCUMENTS AND SYMBOLS ON DISPLAY[1]

CONSTITUTION OF KENTUCY
PREAMBLE

We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.

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[1] The documents that follow are in the original form as they are displayed where it is possible. The text of some of the documents are included in this Appendix because including those documents in their original form as they are displayed would render the text of the documents unreadable.

THE STAR SPANGLED BANNER
The Defense of Fort McHenry
September 20, 1814
By Francis Scott Key

Oh, say can you see, by the dawn's early light,
What so proudly we hailed at the twilight's last gleaming?
Whose broad stripes and bright stars, through the perilous fight.
O'er the ramparts we watched, were so gallantly streaming?
And the rocket's red glare, the bombs bursting in air,
Gave proof through the night that our flag was still there.
O say, does that star-spangled banner yet wave
O'er the land of the free and the home of the brave?

On the shore dimly seen through the mists of the deep,
Where the foe's haughty host in dread silence reposes,
What is that which the breeze, o'er the towering steep,
As it fitfully blows, now conceals, now discloses?
Now it catches the gleam of the morning's first beam,
In full glory reflected, now shines on the stream:
'Tis the star-spangled banner: O, long may it wave
O'er the land of the free and the home of the brave!

And where is that band who so vauntingly swore
That the havoc of war and the battle's confusion,
A home and a country should leave us no more?
Their blood has washed out their foul footstep's pollution.
No refuge could save the hireling and slave
From the terror of flight or the gloom of the grave:
And the star-spangled banner in triumph doth wave

O'er the land of the free and the home of the brave.

O thus be it ever when freemen shall stand
Between their lov'd home and the war's desolation;
Blest with victory and peace, may the heaven-rescued land
Praise the Power that hath made and preserved us a nation.
Then conquer we must, for our cause it is just,
And this be our motto: "In God is our trust."
And the star-spangled banner in triumph shall wave
O'er the land of the free and the home of the brave!

LADY JUSTICE

Lady Justice has become a symbol of the fair and equal administration of the law, without corruption, avarice, prejudice, or favor. The scales represent that justice is administered fairly and the sword represents justice that is authoritative. Lady Justice is a symbol of the American system of justice and the ideals it embodies.

THE MAYFLOWER COMPACT

First Written Constitution in America

In the name of God, Amen. We, whose names are underwritten, the Loyal Subjects of our dread sovereign lord, King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, etc.

Having undertaken for the Glory of God, and Advancement of the Christian Faith, and honor of our king and country, a voyage to plant the first colony in the northern parts of Virginia; do by these present, solemnly and mutually, in the Presence of God and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof do enact, constitute, and frame, such just and equal laws, ordinances, acts, constitutions, officers, from time to time, as shall be thought most meet and convenient for the general good of the Colony; unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names, Cape Cod 11th of November, in the year of the reign of our sovereign lord King James, of England, France, and Ireland 18, and of Scotland 54, Anno Domini 1620.

THE TEN COMMANDMENTS

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.

Remember the sabbath day, to keep it holy.

Honour thy father and they mother: that thy days may be long upon the land which the LORD thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbour.

Thou shalt not covet they neighbour's house, thou shalt not covet they neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is they neighbour's.

DECLARATION OF INDEPENDENCE

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. --That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to

provide new Guards for their future security. --Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain [George III] is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers,

incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us, in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation,

and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by the Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

THE BILL OF RIGHTS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; namely:

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II
A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III
No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and

to have the assistance of counsel for his defense.

Amendment VII
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

MAGNA CARTA

John, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, stewards, servants, and to all his officials and loyal subjects, Greeting.
KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of our reverend fathers Stephen, archbishop of Canterbury, primate of all England, and cardinal of the holy Roman Church, Henry archbishop of Dublin, William bishop of London, Peter bishop of Winchester, Jocelin bishop of Bath and Glastonbury, Hugh bishop of Lincoln, Walter Bishop of Worcester, William bishop of Coventry, Benedict bishop of Rochester, Master Pandulf subdeacon and member of the papal household, Brother Aymeric master of the knighthood of the Temple in England, William Marshal earl of Pembroke, William earl of Salisbury, William earl of Warren, William earl of Arundel, Alan de Galloway constable of Scotland, Warin Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh seneschal of Poitou, Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip Daubeny, Robert de Roppeley, John Marshal, John Fitz Hugh, and other loyal subjects:
1. FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed

by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:

2. If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a `relief', the heir shall have his inheritance on payment of the ancient scale of `relief'. That is to say, the heir or heirs of an earl shall pay £100 for the entire earl's barony, the heir or heirs of a knight l00s. at most for the entire knight's `fee', and any man that owes less shall pay less, in accordance with the ancient usage of `fees'

3. But if the heir of such a person is under age and a ward, when he comes of age he shall have his inheritance without `relief' or fine.

4. The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property. If we have given the guardianship of the land to a sheriff, or to any person answerable to us for the revenues, and he commits destruction or damage, we will exact compensation from him, and the land shall be entrusted to two worthy and prudent men of the same `fee', who shall be answerable to us for the revenues, or to the person to whom we have assigned them. If we have given or sold to anyone the guardianship of such land, and he causes destruction or damage, he shall lose the guardianship of it, and it shall be

handed over to two worthy and prudent men of the same `fee', who shall be similarly answerable to us.

5. For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.

6. Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be' made known to the heir's next-of-kin.

7. At her husband's death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband's house for forty days after his death, and within this period her dower shall be assigned to her.

8. No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.

9. Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt. If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be answerable for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his

obligations to them.
10. If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.
11. If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it. If he leaves children that are under age, their needs may also be provided for on a scale appropriate to the size of his holding of lands. The debt is to be paid out of the residue, reserving the service due to his feudal lords. Debts owed to persons other than Jews are to be dealt with similarly.
12. No `scutage' or `aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes ouly a reasonable `aid' may be levied. `Aids' from the city of London are to be treated similarly.
13. The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.
14. To obtain the general consent of the realm for the assessment of an `aid' - except in the three cases specified above - or a `scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be

stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.
15. In future we will allow no one to levy an `aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable `aid' may be levied.
16. No man shall be forced to perform more service for a knight's `fee', or other free holding of land, than is due from it.
17. Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.
18. Inquests of novel disseisin, mort d'ancestor, and darrein presentment shall be taken only in their proper county court. We ourselves, or in our absence abroad our chief justice, will send two justices to each county four times a year, and these justices, with four knights of the county elected by the county itself, shall hold the assizes in the county court, on the day and in the place where the court meets.
19. If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the administration of justice, having regard to the volume of business to be done.
20. For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

21. Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.
22. A fine imposed upon the lay property of a clerk in holy orders shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice.
23. No town or person shall be forced to build bridges over rivers except those with an ancient obligation to do so.
24. No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices.
25. Every county, hundred, wapentake, and tithing shall remain at its ancient rent, without increase, except the royal demesne manors.
26. If at the death of a man who holds a lay `fee' of the Crown, a sheriff or royal official produces royal letters patent of summons for a debt due to the Crown, it shall be lawful for them to seize and list movable goods found in the lay `fee' of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man s will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.
27. If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.
28. No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.
29. No constable may compel a knight to pay money for castle-guard if the knight is willing to undertake the guard in person, or with reasonable excuse to supply some other fit

man to do it. A knight taken or sent on military service shall be excused from castle-guard for the period of this servlce.
30. No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.
31. Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.
32. We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the `fees' concerned.
33. All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.
34. The writ called precipe shall not in future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord's court.
35. There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.
36. In future nothing shall be paid or accepted for the issue of a writ of inquisition of life or limbs. It shall be given gratis, and not refused.
37. If a man holds land of the Crown by `fee-farm', `socage', or `burgage', and also holds land of someone else for knight's service, we will not have guardianship of his heir, nor of the land that belongs to the other person's `fee', by virtue of the `fee-farm', `socage', or `burgage', unless the `fee-farm' owes knight's service. We will not have the guardianship of a man's heir, or of land that he holds of someone else, by reason of any small property that he may hold of the Crown for a service of knives, arrows, or the like.

38. In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.
39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.
40. To no one will we sell, to no one deny or delay right or justice.
41. All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too.
42. In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants - who shall be dealt with as stated above - are excepted from this provision.
43. If a man holds lands of any `escheat' such as the `honour' of Wallingford, Nottingham, Boulogne, Lancaster, or of other `escheats' in our hand that are baronies, at his death his heir shall give us only the `relief' and service that he would have

made to the baron, had the barony been in the baron's hand. We will hold the `escheat' in the same manner as the baron held it.
44. People who live outside the forest need not in future appear before the royal justices of the forest in answer to general summonses, unless they are actually involved in proceedings or are sureties for someone who has been seized for a forest offence.
45. We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.
46. All barons who have founded abbeys, and have charters of English kings or ancient tenure as evidence of this, may have guardianship of them when there is no abbot, as is their due.
47. All forests that have been created in our reign shall at once be disafforested. River-banks that have been enclosed in our reign shall be treated similarly.
48. All evil customs relating to forests and warrens, foresters, warreners, sheriffs and their servants, or river-banks and their wardens, are at once to be investigated in every county by twelve sworn knights of the county, and within forty days of their enquiry the evil customs are to be abolished completely and irrevocably. But we, or our chief justice if we are not in England, are first to be informed.
49. We will at once return all hostages and charters delivered up to us by Englishmen as security for peace or for loyal service.
50. We will remove completely from their offices the kinsmen of Gerard de Athée, and in future they shall hold no offices in England. The people in question are Engelard de Cigogné', Peter, Guy, and Andrew de Chanceaux, Guy de Cigogné, Geoffrey de Martigny and his brothers, Philip Marc

and his brothers, with Geoffrey his nephew, and all their followers.

51. As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm, with horses and arms.

52. To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgement of his equals, we will at once restore these. In cases of dispute the matter shall be resolved by the judgement of the twenty-five barons referred to below in the clause for securing the peace (§ 61). In cases, however, where a man was deprived or dispossessed of something without the lawful judgement of his equals by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. On our return from the Crusade, or if we abandon it, we will at once render justice in full.

53. We shall have similar respite in rendering justice in connexion with forests that are to be disafforested, or to remain forests, when these were first a-orested by our father Henry or our brother Richard; with the guardianship of lands in another person's `fee', when we have hitherto had this by virtue of a `fee' held of us for knight's service by a third party; and with abbeys founded in another person's `fee', in which the lord of the `fee' claims to own a right. On our return from the Crusade, or if we abandon it, we will at once do full justice to complaints about these matters.

54. No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.

55. All fines that have been given to us unjustiy and against the law of the land, and all fines that we have exacted unjustly, shall be entirely remitted or the matter decided by a majority judgement of the twenty-five barons referred to below in the clause for securing the peace (§ 61) together with Stephen, archbishop of Canterbury, if he can be present, and such others as he wishes to bring with him. If the archbishop cannot be present, proceedings shall continue without him, provided that if any of the twenty-five barons has been involved in a similar suit himself, his judgement shall be set aside, and someone else chosen and sworn in his place, as a substitute for the single occasion, by the rest of the twenty-five.

56. If we have deprived or dispossessed any Welshmen of lands, liberties, or anything else in England or in Wales, without the lawful judgement of their equals, these are at once to be returned to them. A dispute on this point shall be determined in the Marches by the judgement of equals. English law shall apply to holdings of land in England, Welsh law to those in Wales, and the law of the Marches to those in the Marches. The Welsh shall treat us and ours in the same way.

57. In cases where a Welshman was deprived or dispossessed of anything, without the lawful judgement of his equals, by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. But on our return from the Crusade, or if we abandon it, we will at once do full justice according to the laws of Wales and the said regions.

58. We will at once return the son of Llywelyn, all Welsh

hostages, and the charters delivered to us as security for the peace.

59. With regard to the return of the sisters and hostages of Alexander, king of Scotland, his liberties and his rights, we will treat him in the same way as our other barons of England, unless it appears from the charters that we hold from his father William, formerly king of Scotland, that he should be treated otherwise. This matter shall be resolved by the judgement of his equals in our court.

60. All these customs and liberties that we have granted shall be observed in our kingdom in so far as concerns our own relations with our subjects. Let all men of our kingdom, whether clergy or laymen, observe them similarly in their relations with their own men.

61. SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. If we, or in our absence abroad the chiefjustice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon

and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

If-one of the twenty-five barons dies or leaves the country, or is prevented in any other way from discharging his duties, the rest of them shall choose another baron in his place, at their discretion, who shall be duly sworn in as they were.

In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.

The twenty-five barons shall swear to obey all the above articles faithfully, and shall cause them to be obeyed by others to the best of their power.

We will not seek to procure from anyone, either by our own efforts or those of a third party, anything by which any part of these concessions or liberties might be revoked or diminished. Should such a thing be procured, it shall be null and void and

we will at no time make use of it, either ourselves or through a third party.

62.We have remitted and pardoned fully to all men any ill-will, hurt, or grudges that have arisen between us and our subjects, whether clergy or laymen, since the beginning of the dispute. We have in addition remitted fully, and for our own part have also pardoned, to all clergy and laymen any offences committed as a result of the said dispute between Easter in the sixteenth year of our reign (i.e. 1215) and the restoration of peace. In addition we have caused letters patent to be made for the barons, bearing witness to this security and to the concessions set out above, over the seals of Stephen archbishop of Canterbury, Henry archbishop of Dublin, the other bishops named above, and Master Pandulf.

63. IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free, and that men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fulness and entirety for them and their heirs, of us and our heirs, in all things and all places for ever.

Both we and the barons have sworn that all this shall be observed in good faith and without deceit. Witness the abovementioned people and many others.

Given by our hand in the meadow that is called Runnymede, between Windsor and Staines, on the fifteenth day of June in the seventeenth year of our reign (i.e. 1215: the new regnal year began on 28 May).

(2)

Supreme Court, U.S.
FILED
AUG - 9 2004
OFFICE OF THE CLERK

No. 03-1693

In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS, as Pulaski County Judge Executive

Petitioners,

v.

ACLU OF KENTUCKY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming a supplemental preliminary injunction prohibiting Ten Commandments displays in two Kentucky counties where – after first posting stand-alone Ten Commandments displays, then altering those displays during litigation to include excerpts of text focusing on religion – the counties posted a third display surrounding the Ten Commandments with patriotic and political documents from American, Colonial and British history?

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STATEMENT OF THE CASE

In 1999, McCreary County erected in its county courthouse a Ten Commandments display consisting only of a "framed copy of one version of the Ten Commandments . . . [which] was not part of any larger educational, historical, or retrospective exhibit." [Petitioner Appendix (Pet. App.) 6a.] It did so pursuant to a fiscal court (county legislature) order, signed by petitioner Jimmie Green, *id.*, that "the display be posted in a very high traffic area of the courthouse." *ACLU of Kentucky v. McCreary County,* 96 F.Supp.2d 679, 684 (E.D. Ky. 2000) (*McCreary County I*).

Pulaski County erected a similar display in its county courthouse. [Pet. App. 6a.] Petitioner Darrell BeShears (the County Judge Executive, or chief executive branch officer) candidly expressed his religious purpose in erecting the display: "I've always felt like God comes first, country second and family third." [Joint Appendix on appeal to Sixth Circuit (J.A.) at 86-89.]

The respondents filed suit, contending that the Ten Commandments displays violated the First Amendment's establishment clause. [Pet. App. 3a.] Soon thereafter, the petitioners modified their Ten Commandments displays to include several other documents; the petitioners conceded that they did so "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." [Pet. App. 7a (quoting *McCreary County I*, 96 F.Supp.2d at 684).] Instead of stand-alone copies of the Ten Commandments, the petitioners' modified displays included all or part of eight

documents.[1] [Pet. App. 7a] In their second displays, the petitioners "excerpted a small portion of [some documents] to include only that document's reference to God or the Bible . . . " [Pet. App. 8a (quoting *McCreary County I*, 96 F.Supp.2d at 684, 696)(brackets added).] Upon motion, the district court preliminarily enjoined the continuation of these modified Ten Commandments displays. [Pet. App. 8a.][2]

Several months later, the petitioners erected their third Ten Commandments displays. [Pet. App. 8a.]. This time, instead of surrounding the Ten Commandments with excerpted text focusing on God or the Bible, the petitioners surrounded the Ten Commandments with American (and earlier Colonial and British) political and patriotic texts, song lyrics and a picture. [*See* Pet. App. 8a-10a (detailing contents of displays).] The courthouse displays contained a Biblical reference, identifying the Ten Commandments as deriving from the "King James Version" of "Exodus 20:3-17." [Pet. App. 10a, n.5.] Upon further motion, the district court supplemented its preliminarily injunction to enjoin the petitioners' third version of their Ten Commandments displays. [Pet. App. 12a-13a.]

[1] The eight documents were an excerpt from the Declaration of Independence, the Preamble to the Constitution of Kentucky, the national motto of "In God We Trust," a page from the Congressional Record declaring 1983 the Year of the Bible, a proclamation by President Lincoln declaring April 30, 1863 a National Day of Prayer and Humiliation, an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, a proclamation by President Reagan marking 1983 as the year of the Bible, and the Mayflower Compact. *McCreary County I*, 96 F.Supp.2d at 684.

[2] The governments initially appealed, but then abandoned their appeals, from the preliminary injunctions. [*See* Pet. App. 4a.]

A divided Sixth Circuit panel affirmed, agreeing that – on this record – the district court did not abuse its discretion in finding that the petitioners' primary purpose in posting their Ten Commandments displays was to endorse religion. *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003).[3]

In addressing whether the predominant purpose for petitioners' displays was religious, the Sixth Circuit read *Stone v. Graham*, 449 U.S. 39, 42 (1980), to require that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message." [Pet. App. 21a-22a.] In the courthouse context, "[t]he government achieves this goal by ensuring that the symbols, pictures and/or words in the display share a common secular theme or subject matter." [Pet. App. 22a.] And the Sixth Circuit deemed it necessary to examine three factors "when assessing whether the Ten Commandments have been presented objectively and integrated with a secular message: the content of the displays, the physical setting in which the Ten Commandments are displayed and any changes that Defendants have made to the displays since their inception." [*Id.*]

The Sixth Circuit found that all three factors – content, context and evolution of the displays – showed a predominantly religious purpose. As for content: The displays' one-page prefatory document "asserts a connection between the Ten Commandments and 'the formation of our country' and 'our legal tradition.'" [Pet. App. 27a-28a.] But the Court

[3] One judge concluded (as had the district court) that the displays also had the impermissible effect of endorsing religion; one disagreed; the third declined to reach the issue.

deemed this thesis "not facially apparent" and found that "the preface offers no explanation" to show how "the Declaration [of Independence] is in any way connected with the Ten Commandments." [Pet. App. 18a.] The Court found that the "solitary similarity" between the Ten Commandments and the Declaration of Independence – that both recognize the existence of a deity – "hardly demonstrates how the Ten Commandments *in particular* influenced the writing of the Declaration and, hence, the foundation of our country and legal tradition." [*Id.* (emphasis in original).] The petitioners thus failed to "buttress the historical claim that the prefatory document makes about the Ten Commandments' foundational role in the drafting of the Declaration of Independence," [Pet. App. 29a], and did not cite "to a single historical source in support of the proposition that the Ten Commandments inspired the drafting of the Declaration of Independence." [Pet. App. 32a.] The Court therefore found that the display was not an "objective presentation of the Ten Commandments," [*id.*], but one that went "out of its way to stress the proposition that the Ten Commandments formed the foundation of the Declaration of Independence while utterly ignoring (and implicitly denying) all other influences." [*Id.*]

The Court therefore deemed the content of the petitioners' displays to evidence a religious purpose: "When distilled to their essence, the courthouse displays demonstrate that [petitioners] intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition." [Pet. App. 32a.] Because the display asserted "that the Ten Commandments provide *the* moral background of the Declaration of Independence and

the foundation of our legal tradition" and thus "emphasiz[ed] a single religious influence, with no mention of any other religious or secular influences," the Sixth Circuit concluded that the district court did not abuse its discretion in finding that petitioners' primary "purposes were religious." [Pet. App. 33a (internal quotation marks and citation omitted) (emphasis added in *McCreary County I*).]

As for context: The Sixth Circuit recognized that *Stone* and *Lynch v. Donnelly*, 445 U.S. 668 (1984), governed its inquiry. Applying those cases, the Court concluded that, even though the displays "did not provide undue physical emphasis to the Ten Commandments," the "Commandments are an active symbol of religion . . . As such, [petitioners] had to exercise special care to present the Ten Commandments objectively and as an integral part of a non-religious message," but failed to do so. [Pet. App. 35a-36a.]

As for evolution of the display: The Sixth Circuit recognized that *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), required it to consider petitioners' conduct throughout this dispute in determining their primary purposes. [Pet. App. 36a.] Petitioners' first displays contained only the Ten Commandments. Their second displays "accentuated [the petitioners'] religious purpose . . . by posting the Commandments along with specific references to Christianity and texts that . . . were chosen solely for their religious references." [Pet. App. 41a (internal quotation marks omitted).] Their third displays – at issue here – contained full text from secular political and patriotic documents. [*See* Pet. App. 8a-10a (describing content of displays).] Applying *Santa Fe*, the Sixth Circuit held that the district court did not clearly err in concluding that

the evolution also "indicated that the primary purpose was religious." [Pet. App. 42a.]

The Sixth Circuit later denied rehearing en banc, with two judges concurring and two dissenting. [Pet. App. 163a-176a.]

REASONS FOR DENYING THE WRIT

Review is inappropriate for three reasons. First, the Sixth Circuit correctly applied settled establishment clause law in finding that the district court did not abuse its discretion when it concluded that – on this record, with this litigation history – the petitioners' primary purpose in repeatedly posting the Ten Commandments was to endorse religion. The petitioners merely seek to correct what they perceive to be an incorrect application of well-settled principles of law.

Second, there is no conflict among the circuits. The Sixth Circuit's opinion applies the same governing principles as has every federal court of appeals considering Ten Commandments displays. Where the outcomes differ, they do so because of a case's specific facts or its unique litigation history.

Third, this case's procedural posture warrants denial of review. The district court's opinion was a preliminary injunction, where it deemed respondents likely to prevail. The Sixth Circuit's review thus was deferential, affirming because the district court did not abuse its discretion. These twin qualifiers – discretion to conclude that a party is likely to prevail – make this case unworthy of review.

ARGUMENT

I. The Sixth Circuit Correctly Applied This Court's Cases To Affirm That Petitioners' Primary Purpose Likely Was To Endorse Religion.

The Sixth Circuit properly recognized the establishment clause principles by which petitioners' displays must be gauged [Pet. App. 15a-16a], and correctly affirmed that petitioners' primary purposes were not secular. In doing so, the appeals court properly applied this Court's lone Ten Commandments case and its general establishment clause jurisprudence.

Where "a governmental intention to promote religion is clear," *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987), this Court has not hesitated to hold the challenged conduct unconstitutional. Thus, the Court has invalidated Louisiana's creationism statute, *Aguillard*; struck down a Kentucky law requiring the posting of the Ten Commandments in public schools, *Stone*; struck down Alabama's moment of silence statute, *Wallace v. Jaffree*, 472 U.S. 38 (1985); and held unconstitutional the mandated daily reading of Bible verses and the Lord's Prayer in public schools. *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). Significantly, in each of those cases, this Court held that the challenged conduct was motivated by a religious purpose, and disregarded the government's assertion of a sincere nonreligious purpose.

Nor is the requirement of a secular purpose "satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (Justice O'Connor, concurring). While a government's professed secular purpose for an arguably religious policy is entitled to "some deference," it is "the duty of the courts

to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 75) (brackets supplied in *Santa Fe Indep. Sch. Dist.*).

There are two distinct reasons for affirming the appeals court's conclusion that these displays lack a valid secular purpose. First, this Court has rejected a similar articulated purpose as not secular. Second, this litigation's history reveals that petitioners' articulated secular purpose is a sham.

The petitioners assert that they seek merely to show the Ten Commandments' influence on American law and government. But the appeals court correctly held that – by equating this one religious document with the Magna Carta, Bill of Rights and Declaration of Independence; by claiming that the Ten Commandments "provide the moral background of the Declaration of Independence and the foundation of our legal tradition," [Pet. App. 180a]; by "emphas[izing] a single religious influence, with no mention of any other religious or secular influences" [Pet. App. 34a] – petitioners had displayed a non-secular purpose similar to one this Court rejected more than twenty years ago.

In *Stone*, 449 U.S. 39, this Court summarily struck down a Kentucky statute requiring schools to post copies of the Ten Commandments. Kentucky's statute required that each Ten Commandments display include the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41. This

Court was unpersuaded: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted).

The articulated "secular purpose" here is but a variation on that theme. Because the petitioners' purpose – declaring that the Ten Commandments "provide the moral background of the Declaration of Independence and the foundation of our legal tradition" – is conceptually identical to Ky. Rev. Stat. § 158.178(2)'s purpose – showing the Ten Commandments' adoption as the "fundamental legal code of Western Civilization and the Common Law," – *Stone* establishes that the asserted secular purpose "cannot blind" this Court to the obvious sacred nature of the displays. And where, as here, the displays "utterly fail to integrate the Ten Commandments with a secular subject matter" [Pet. App. 33a], the appeals court correctly found no reason to distinguish petitioners' purpose from Kentucky's purpose in *Stone*.

Second, courts "not only can, but must, include an examination of the circumstances surrounding [the governmental] enactment." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308. Here, those circumstances reveal the innately sectarian backdrop to these displays. In 1999, local governments throughout Kentucky posted the Ten Commandments in courthouses, schools and other public buildings. The local governments invited legal challenges and these two received them amid wide publicity. They initially posted only the Ten Commandments and petitioner Greene candidly admitted his religious reasons for doing so. After being sued, petitioners cloaked their displays in textual excerpts celebrating religion and

announced their purpose of "demonstrat[ing] America's Christian heritage." *McCreary County I*, 96 F.Supp.2d at 674. And after the district court enjoined their second Ten Commandments displays, petitioners posted their third, purporting merely to display "historical documents." The district court was well within its discretion, as the appeals court concluded, in finding it no coincidence that the Ten Commandments was among the "historical documents" that petitioners opted to display. The petitioners "nevertheles[s] as[k the courts] to pretend that [they] do not recognize what every [one else] underst[ood] clearly – that this [display was] about prayer." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 319.[4]

For these reasons, the Sixth Circuit properly applied this Court's precedents in affirming the district court's conclusion: that respondents are likely to prevail on their claim that petitioners lacked a valid secular purpose for posting their displays.

II. There Is No Significant Conflict In The Federal Appeals Courts.

This Court has considered the constitutionality of governmental Ten Commandments displays only once. In *Stone v. Graham*, 449 U.S. 39 (1980), the Court summarily struck down a Kentucky statute requiring each public school to post the Ten Commandments on classroom walls.

[4] Petitioners complain that the appeals court deemed their current secular purpose forever doomed by their earlier religious purpose. [*See* Petition at 25-30.] But the court did no such thing; rather, it (like the district court) took the earlier articulated purpose into account in assessing whether the current – supposedly secular – purpose is a sham. And *Santa Fe* requires courts to do so.

Although each display was to include a disclaimer that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," *id.* at 41, the Court held the statute unconstitutional because:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths. The Commandments do not confine themselves to arguably secular matters . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Id., 449 U.S. at 41-42 (footnote and citations omitted); *see id.*, 449 U.S. at 42 (referring to the Ten Commandments as a "religious text[]").

The courts of appeals have consistently applied *Stone* to strike down many displays of the Ten Commandments at the seat of government. Here, the Sixth Circuit deemed petitioners' articulated "secular purpose" but a variation on the *Stone* theme. In *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003), the Sixth Circuit applied *Stone* to bar the state from erecting a Ten Commandments monument at the central focal point of the state capitol grounds. In *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002), the Seventh Circuit applied *Stone* to bar the state from maintaining a Ten Commandments monument at the Indiana Statehouse. *See*

id., 259 F.3d at 770-71. And in *Books v. City of Elkhart, Ind.*, 235 F.3d 292 (7th Cir.), *cert. denied*, 532 U.S. 1058 (2002), the Seventh Circuit applied *Stone* to enjoin a city's similar Ten Commandments display. *Id.*, 235 F.3d at 302.

The courts of appeals cases since *Stone* do not conflict with the Sixth and Seventh Circuits' application of that decision.[5] Those circuit court cases permitting Ten Commandments displays have involved truly secular purposes – that is, something other than a thinly-veiled effort to proclaim the triumphal influence of the Ten Commandments on American law. *See, e.g., Freethought Society v. Chester Cty.*, 334 F.3d 247, 262 (3d Cir. 2003) (decision not to remove eighty year old plaque had secular purpose of preserving county's history, where county officials had not "celebrate[d] or highlighte[d]" plaque's religious content); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003) (valid secular purpose, in accepting Ten Commandments monument forty years earlier, of recognizing and commending private organization's efforts to reduce juvenile delinquency); *King v. Richmond Cty.*, 331 F.3d 1271 (11th Cir. 2003) (where no evidence of original purpose exists for use of pictograph of Ten Commandments in county seal, articulation of secular purpose of symbolizing rule of law valid).

[5] Seven years before *Stone*, the Tenth Circuit held that the Ten Commandments are not primarily religious in nature. *See Anderson v. Salt Lake City*, 475 F.2d 29, 34 (10th Cir. 1973). That court has since questioned *Anderson*'s continued vitality. *See Summum v. Callaghan*, 130 F.3d 906, 910 n.2 (10th Cir. 1997) ("Since *Anderson* was decided, however, more recent cases, including a Supreme Court case, cast doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature"); *id.*, 130 F.3d at 912 n.8 ("our decision in *Anderson* has been called into question by the Supreme Court in *Stone*") (citations omitted).

This case clearly differs from those cited above. All of the above cases involved decades-old displays; petitioners' displays are new. All of the above cases involved articulated secular purposes other than efforts to link the Ten Commandments with American law and government. And none of the above cases had this case's litigation history of repeated unsuccessful efforts to post the Ten Commandments. These stark differences reveal no conflict in the circuits about application of *Stone* to modern Ten Commandments displays.

III. This Case's Procedural Posture Warrants Denial Of Review.

Even if the Court were inclined to review application of the Establishment Clause to a Ten Commandments display, this case is not the proper vehicle for review. The case involves a preliminary injunction. As such, the district court held only that respondents were likely to prevail on the merits. And the appeals court affirmed under a deferential standard, holding that the district court had not abused its discretion in granting its supplemental preliminary injunction. These twin qualifiers – discretion and likelihood of prevailing on the merits – limit the reach of the decision below and make the case unworthy of this Court's review.

CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the context-based inquiry demanded by this Court. There is no meaningful conflict with decisions of another circuit court. And the case's procedural

posture argues against review. Because there are no grounds for granting plenary review, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 17 2004
OFFICE OF THE CLERK

(3)

No. 03-1693

IN THE

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McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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II.

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I.

THE SIXTH CIRCUIT'S OPINION IS NOT CONSISTENT WITH THIS COURT'S DECISION IN *STONE V. GRAHAM*.

Respondents spend a large portion of their Brief arguing that the Sixth Circuit's decision in this case represents nothing more than a mechanical application of this Court's decision in *Stone v. Graham*, 449 U.S. 39 (1980). Respondents argue that the articulated purpose in this case is identical to the articulated purpose in *Stone* and, therefore, *Stone* mandates that the Sixth Circuit's decision was correct. Nothing could be further from the truth.

In *Stone*, the Supreme Court, in what Justice Rehnquist termed a "cavalier summary reversal", *id.* at 47, held unconstitutional a statute that mandated the display of the Ten Commandments on the walls of Kentucky classrooms. The Court rejected the State's articulated purpose. *Id.* The Ten Commandments hung by themselves on the walls of the classroom and Kentucky made no attempt to place the Ten Commandments in context with secular legal documents. The fact that the Ten Commandments hung by themselves was the determinative factor in this Court's rejection of the articulated secular purpose. That is why this Court noted, "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function." *Id.* at 42 (citation omitted). This Court specifically acknowledged that

the Ten Commandments could be placed in context with other appropriate secular literature or documents.

If there was any doubt about this conclusion, this Court made it clear that *Stone* does not stand for the broad, sweeping holding urged by the Respondents in this case. This Court has explained the reach of *Stone* in *Lynch v. Donnelly*, 465 U.S. 668 (1984). *Lynch* dealt with the constitutionality of a creche displayed on government property. This Court stated:

> In this case, the focus of our inquiry must be on the creche in the context of the Christmas season. *See, e.g., Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam); *Abington School District v. Schempp*, supra. In *Stone*, for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But **the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."**

Lynch, 465 U.S. at 679 (emphasis added). The statute in *Stone* had no secular purpose because the Ten Commandments were displayed alone "purely as a religious admonition." Had the document been displayed in broader context, the case would have been much different. Additionally, in their dissent from the denial of certiorari in the case of *City of Elkhart v. Books*, 121 S. Ct. 2209 (2001), Chief Justice Rehnquist, together with Justices Scalia and

Thomas explained the *Stone* case as follows:

> *Stone's* unique setting may explain our reluctance to accept in that case the State's view that its display of the Commandments had a secular purpose. But **we have never determined in *Stone* or elsewhere, that the Commandments lack a secular application**. To be sure, the Ten Commandments are a "sacred text in the Jewish and Christian faiths," concerning, in part, "the religious duties of believers." **Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes**. Even *Stone* noted that "integrated into the school curriculum" the Commandments "may constitutionally be used in an appropriate study of history, civilization, [or] ethics." And as the Court of Appeals recognized, "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order."

Id. at 2211 (Rehnquist, C.J., dissenting)(emphasis added).

Justice Stevens, concurring and dissenting in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), likewise demonstrates the fact that *Stone* does not result in a broad, *per se* invalidation of every Ten Commandments display as urged by the respondents in this case. In his opinion, Justice Stevens stated, "For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an **equivocal** message, perhaps of respect for

Judaism, for religion in general, or for law." *Id.* at 652-53 (emphasis added). Thus the Ten Commandments alone might convey a message of (1) respect for Judaism, or (2) religion in general, or (3) law. Placing other religious images beside the Ten Commandments would tip the scale from "equivocal" to "religious." Adding secular images tips the scale from "equivocal" to "secular." Justice Stevens then noted, "Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders [Moses, Confucius and Mohammed], however, signals respect not for great proselytizers but for great lawgivers." *Id.* The exact situation is presented in this case. This case is factually and completely different from *Stone* and the Sixth Circuit's opinion in this case is not the result of a mechanical application of the principles outlined in *Stone*. While it is true that this Court rejected Kentucky's asserted secular purpose twenty years ago in *Stone*, it is also true that the case would have been different if the Ten Commandments appeared in the context of a larger display. This is that case.

II.

RESPONDENTS' RELIANCE ON THE PRIOR HISTORY OF THE DISPLAYS ILLUMINATES THE SPLIT AMONG THE CIRCUITS AND ILLUSTRATES THE IMPORTANCE OF THIS COURT'S RESOLUTION OF THE LEGAL EFFECT TO BE GIVEN TO A GOVERNMENTAL ENTITY'S ALLEGED PAST UNCONSTITUTIONAL ACTION.

Respondents rely heavily on the prior history of the

governmental entities in this case to demonstrate their claim of unconstitutionality. Their heavy reliance on past history demonstrates the split among the Circuit Courts as to the legal effect to be given to such prior history and also demonstrates the precise reason why this Court should grant certiorari to resolve this issue of great public importance.

A. Respondents Do Not Dispute The Circuit Split On The Issue Of The Legal Effect Of A Governmental Entity's Alleged Past Unconstitutional Purpose.

Respondents never dispute the existence of a clear split among the Circuit Courts on the issue of the legal effect to be given to a governmental entity's past alleged unconstitutional purpose. The Sixth Circuit's decision in this case clearly conflicts with the Third Circuit's decision in *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), with the Seventh Circuit's decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), and with the Sixth Circuit's own opinions in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), and *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002). Respondents never dispute the existence of this split among the Circuit Courts. If Petitioners were located in either the Third or Seventh Circuits, they would be allowed to change their past conduct to conform to constitutional standards without the change in the conduct reflecting negatively on their *current* articulation of a secular purpose. The *Schundler*, *Metzl*, *Granzeier* and *Adland* cases all allow a Defendant to change its conduct to bring itself within constitutional boundaries. The Sixth Circuit's decision stands in stark contrast to the decisions from these Circuits and Respondents do not dispute this conflict.

B. Respondents' Reliance On Past Conduct To Taint A Present Constitutional Display Illustrates The Necessity Of A Decision By This Court On This Issue Of Great Public Importance.

Respondents' insistent reliance on past conduct to taint present constitutional actions illustrates precisely why this Court must accept this case to resolve this issue. The split among the Circuit Courts must be resolved by this Court because the resolution of this important legal issue has far-reaching ramifications for governmental entities caught in an Establishment Clause challenge. If a governmental entity missteps once in the Establishment Clause minefield, it can never correct its action under the Sixth Circuit's decision. The Sixth Circuit's decision leaves governmental entities with one option in remedying an actual or alleged constitutional violation - remove the display. The Sixth Circuit's decision and the undue weight it places on past unconstitutional conduct puts government between the Scylla of flouting the law and the Charybdis of having their past action counted against them in any future change seeking to bring the government within constitutional boundaries. Left unchecked, the Sixth Circuit's decision will unfairly handicap governmental entities in Establishment Clause cases. A "one strike and you are out" policy under the Establishment Clause is highly inappropriate in an area of the law that is subject to such change and uncertainty, even among the members of this Court. Government must be given the leeway to change its conduct to bring itself within constitutional boundaries. This Court must accept this case for the purpose of allowing such beneficial change.

III.

THERE IS A SIGNIFICANT CONFLICT AMONG THE CIRCUIT COURTS REGARDING THE CONSTITUTIONALITY OF DISPLAYS OF THE TEN COMMANDMENTS.

Respondents claim that "The courts of appeals have consistently applied *Stone* to strike down many displays of the Ten Commandments at the seat of government." Such a statement simply misses the significant conflict that exists among the Circuit Courts on the issue of the constitutionality of the display of the Ten Commandments. The Respondents gloss over the significant conflict by attempting to attribute the deep conflict among the Circuit Courts as simply factual variations in different cases, such as the age of the displays, and the fact that the articulated purposes were different. Nothing, though, can simply make the deep conflict among the Circuit Courts on the constitutionality of displays of the Ten Commandments disappear.

Factual distinctions in the cases cannot overshadow the division among the Courts of Appeals over the constitutionality of governmental displays containing the Ten Commandments. It is clear from even a cursory reading of the cases dealing with such displays that the Courts of Appeals are in disarray over the proper test to be used in judging displays of the Ten Commandments, the weight to be given to the articulation of a secular purpose and the ultimate outcome concerning the constitutionality of such displays.

It is impossible to explain why the exact same monument was held constitutional in *Van Orden v. Perry*, 351 F.3d 173

(5th Cir. 2003), and was struck down as unconstitutional in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). It is impossible to understand why the government's articulation of a secular purpose for the display of a religious symbol in the context of other secular symbols was found to be sufficient in *Lynch v. Donnelly*, 465 U.S. 668 (1984), but was found to be insufficient in the Sixth Circuit's decision in this case. Why is a bronze plaque containing the Ten Commandments by themselves on a wall constitutional, *see Freethought Society v. Chester Cty.*, 334 F.3d 247 (3d Cir. 2003), while a display of nine historical documents, only one of which is religious, is unconstitutional? It is also impossible to explain why the present case and the case of *ACLU v. Mercer County*, 219 F. Supp. 2d 777 (E.D. Ky. 2002), came to such drastically divergent results when the displays at issue in both cases were identical. The conflict regarding governmental displays of the Ten Commandments and other religious symbols cannot be brushed aside as easily as Respondents attempt to do. The lower courts are in conflict over the proper test and weight to be applied to review of the constitutionality of governmental displays of religious symbols including the Ten Commandments. This Court must accept this case to resolve the conflict.

IV.

THE PROCEDURAL POSTURE OF THIS CASE SHOULD NOT DISCOURAGE THIS COURT FROM REVIEW.

Respondents attempt to discourage this Court from review of this important case and resolution of the conflicts among the lower courts by pointing to the fact that this case

is an appeal from a preliminary injunction. However, the procedural posture of this case is irrelevant. As the Sixth Circuit noted in its opinion, "The injunction will be disturbed if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." (App., 13a). Indeed, this case is not a factual dispute. This case is a dispute concerning the proper legal standard to be employed in judging the constitutionality of governmental displays containing the Ten Commandments. This is true considering the fact that the District Court has stayed any further proceedings in this case pending the outcome of this Petition for Writ of Certiorari. As the District Court noted in its order staying the case, "In the interests of judicial economy and efficiency, this court will stay the proceedings in this case.... Cases construing the Establishment Clause have traditionally been marked by disagreement and uncertainty, even within the Sixth Circuit." *See* December 4, 2001, Order of District Court granting stay at 2.[1] The District Court, and the Sixth Circuit recognized that this case presented a purely legal issue regarding the proper test to be used to judge the constitutionality of governmental displays of the Ten Commandments.

This Court routinely grants certiorari in cases involving appeals from a District Court's grant of a preliminary

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[1] Further, there are at least three other cases within the Sixth Circuit that have been stayed pending the final outcome of this case. *See ACLU v. Grayson Cty.*, 2002 WL 1558688, *6 (W.D. Ky. 2002); *ACLU v. Rowan Cty.*, Case No. 01-CV-220 (E.D. Ky.) (stayed pending decision in this case); *ACLU v. Rutherford Cty.*, Case No. 3-02 0396 (M.D. Tenn.) (stayed pending decision in this case).

injunction. *See, e.g., Ashcroft v. ACLU*, 124 S.Ct. 2783 (June 29, 2004). In this case, certiorari is warranted because of the legal questions and the conflicts clearly presented. This Court should accept this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

(5)

No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, *et al.*
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY (LONDON)
CIVIL DOCKET FOR CASE #: 6:99-cv-00507-JBC

Date	#	Description
11/18/1999	1	COMPLAINT (one summons issued) with copy, given to attorney for service of process, Fee Paid $ 150, Receipt No. 082262 (RBB) (Entered: 11/19/1999)
11/18/1999	2	MOTION by plaintiff ACLU of KY, plaintiff Louanne Walker, plaintiff Dave Howe for preliminary injunction (RBB) (Entered: 11/19/1999)
11/18/1999	3	MEMORANDUM by plaintiff ACLU of KY, plaintiff Louanne Walker, plaintiff Dave Howe in support of motion for preliminary injunction [2-1] (RBB) (Entered: 11/19/1999)
12/21/1999	4	MOTION by defendant Jimmie Greene, defendant McCreary County, KY to dismiss complaint (RBB) (Entered: 12/22/1999)
12/21/1999	5	MEMORANDUM by defendant Jimmie Greene, defendant McCreary County, KY in support of motion to dismiss complaint [4-1] (RBB) (Entered: 12/22/1999)
01/05/2000	6	ORDER by Judge Jennifer B. Coffman:

ORDERED that plfs shall have until 1/23/00 to file a response to dfts' motion to dismiss (cc: all counsel) [EOD Date: 1/6/00] (RBB) (Entered: 01/06/2000)

01/10/2000 7 MOTION by plaintiff, defendant for extension until and including 1/23/00 to respond to dfts' motion to dismiss (NHS) (Entered: 01/12/2000)

01/12/2000 -- SUBMITTED re motion for extension until and including 1/23/00 to respond to dfts' motion to dismiss [7-1] is submitted (NHS) (Entered: 01/12/2000)

02/09/2000 8 MOTION by plaintiff ACLU of KY, plaintiff Louanne Walker, plaintiff Dave Howe for leave to file consolidated reply memo in support of their motions for preliminary injunction and in response to dfts' mts to dismiss; stating dfts consented to additional extension of time (RBB) (Entered: 02/11/2000)

02/09/2000 -- PROPOSED REPLY AND RESPONSE tendered by plaintiff ACLU of KY, plaintiff Louanne Walker, plaintiff Dave Howe; REPLY IN SUPPORT OF PLF'S MTS FOR PRELIMINARY INJUNCTION AND IN RESPONSE TO DFTS' MOTIONS TO DISMISS (RBB) (Entered: 02/11/2000)

02/11/2000 -- SUBMITTED re motion for leave to file consolidated reply memo in support of their motions for preliminary injunction and in response to dfts' mts to dismiss [8-1] is submitted (RBB) (Entered: 02/11/2000)

03/02/2000 9 ORDER by Judge Jennifer B. Coffman: granting plf's motion for leave to file consolidated reply memo in support of their motions for preliminary injunction and in response to dfts' mts to dismiss (cc: all counsel) [EOD Date: 3/2/00] (RBB) (Entered: 03/02/2000)

03/02/2000 10 REPLY by plaintiff ACLU of KY, plaintiff Louanne Walker, plaintiff Dave Howe to dfts' response to plfs' motion for preliminary injunction [2-1] (RBB) (Entered: 03/02/2000)

03/02/2000 10 RESPONSE by plaintiff ACLU of KY, plaintiff Louanne Walker, plaintiff Dave Howe to dfts' motion to dismiss complaint [4-1] (RBB) (Entered: 03/02/2000)

03/02/2000 -- SUBMITTED re motion for preliminary injunction [2-1] is submitted (RBB) (Entered: 03/02/2000)

03/20/2000 11 MOTION by defendant Jimmie Greene, defendant McCreary County, KY for oral argument (RBB) (Entered: 03/22/2000)

03/20/2000 12 RESPONSE by defendant Jimmie Greene, defendant McCreary County, KY to plfs' CONSOLIDATED REPLY [10-1]; ATTACHMENTS FILED SEP. VOL. (RBB) (Entered: 03/22/2000)

03/20/2000 12 (MEMORANDUM) REPLY by defendant Jimmie Greene, defendant McCreary County, KY to plfs' response to dfts' motion to dismiss complaint [4-1]; ATTACHMENTS FILED IN SEP. VOL. (RBB) (Entered: 03/22/2000)

03/20/2000 12 MEMORANDUM by defendant Jimmie Greene, defendant McCreary County, KY in support of motion for oral argument [11-1]; ATTACHMENTS FILED IN SEP. VOL. (RBB) (Entered: 03/22/2000)

03/22/2000 -- SUBMITTED re motion dfts' to dismiss complaint [4-1] is submitted (RBB) (Entered: 03/22/2000)

03/27/2000 13 ORDER by Judge Jennifer B. Coffman: ORDERED that this matter is scheduled for hearing at London on April 20, 2000 at 1:00 p.m. (cc: all counsel) [EOD Date: 3/27/00] (RBB) (Entered: 03/27/2000)

04/20/2000 14 GENERAL MINUTES: before Judge Jennifer B. Coffman; Date(s) 4/20/00; Court Reporter Nathan Perkins; in-court hearing held 4/20/00 ; Laurie Griffith,

David Friedman, Kathleen M. Flynn for plfs; Theodore Amshoff, Ronald Ray, Johnnie Turner for dfts; case called for oral argument; taking under advisement the motion to dismiss complaint [4-1], taking under advisement the motion for preliminary injunction [2-1] (cc: all counsel) [EOD Date: 4/21/00] (NHS) (Entered: 04/21/2000)

05/05/2000 15 ORDER by Judge Jennifer B. Coffman: ORDERED that plf's motion to dismiss is DENIED; FURTHER ORDERED that theTen Commandments display shall be removed from the McCreary County Courthouse IMMEDIATELY; FURTHER ORDERED that neither the dft Jimmie Greene nor any other McCreary County Official, acting in their official capacity, shall erect or cause to be erected similar displays w/in McCreary County, KY (cc: all counsel) [EOD Date: 5/5/00] (RBB) (Entered: 05/05/2000)

05/10/2000 16 NOTICE OF APPEAL by defendant Jimmie Greene, defendant McCreary County, KY from Dist. Court ORDER entered 5/5/00 [15-1] (cc: all counsel) (RBB) (Entered: 05/11/2000)

05/10/2000 17 MOTION by defendant Jimmie Greene, defendant McCreary County, KY for order staying preliminary injunction during

pendency of appeal (RBB) (Entered: 05/11/2000)

05/10/2000 18 MEMORANDUM by dft Jimmie Greene, dft McCreary County, KY in support of motion for order staying preliminary injunction during pendency of appeal [17-1] (RBB) (Entered: 05/11/2000)

05/10/2000 -- RECEIVED re NOTICE OF APPEAL [16-1] fee in amount of $ 105 (Receipt # 083386) (RBB) (Entered: 05/11/2000)

05/11/2000 -- NOTIFICATION to 6CCA; Short Record Mailed, Appeal Package Mailed to Appellant, Copy of Docket Sheet to Parties; [16-1] (cc: all counsel) (RBB) (Entered: 05/11/2000)

05/12/2000 19 ORDER by Judge Jennifer B. Coffman: ORDERED denying dft's motion for order staying preliminary injunction during pendency of appeal [17-1]; FURTHER ORDERED that plfs need not respond to dfts' mt for a stay (cc: all counsel) [EOD Date: 5/12/00] (RBB) Modified on 05/12/2000 (Entered: 05/12/2000)

05/15/2000 20 MOTION by defendant Jimmie Greene, defendant McCreary County, KY for order to stay preliminary inj during pendency of mt to 6CCA for stay pending appeal (RBB) (Entered: 05/18/2000)

----------V O L U M E 2----------

05/22/2000 21 ORDER by Judge Jennifer B. Coffman: IT IS SO ORDERED; finding the defts' motion for order to stay preliminary inj during pendency of mt to 6CCA for stay pending appeal [20-1] moot (cc: all counsel) [EOD Date: 5/22/00] (EHM) (Entered: 05/22/2000)

05/25/2000 22 CERTIFIED COPY of 6CCA Order: ORDERED that dfts' mts for stays pending appeal of the preliminary injunctions issued by the district court are DENIED (RBB) (Entered: 05/25/2000)

05/25/2000 23 MOTION by defendant Jimmie Greene, defendant McCreary County, KY for additional 20 days to answer complaint (RBB) (Entered: 05/30/2000)

05/25/2000 24 MOTION by defendant Jimmie Greene, defendant McCreary County, KY to withdraw counsel Colonel Ronald Ray and Theodore H. Amshoff, Jr. (RBB) (Entered: 05/30/2000)

05/30/2000 25 NOTIFICATION by 6CCA of Appellate Docket Number 00-5632; Mary Patterson, Case Manager (SKV) (Entered: 05/30/2000)

06/06/2000 26 MOTION by defendant Jimmie Greene,

defendant McCreary County, KY for attorney ERIK W. STANLEY to appear pro hac vice (RBB) (Entered: 06/07/2000)

06/06/2000 27 MOTION by defendant Jimmie Greene, defendant McCreary County, KY for attorney MATHEW D. STAVER to appear pro hac vice (RBB) (Entered: 06/07/2000)

06/07/2000 -- FEE PAID $ 130, Receipt No. 083469; PHV fee for attorney Staver and Stanley (RBB) (Entered: 06/07/2000)

06/07/2000 -- SUBMITTED re motion for attorney MATHEW D. STAVER to appear pro hac vice [27-1], re motion for attorney ERIK W. to appear pro hac vice [26-1], re motion to withdraw counsel Colonel Ronald Ray and Theodore H. Amshoff, Jr. [24-1], re motion for additional 20 days to answer complaint [23-1] is submitted (RBB) (Entered: 06/07/2000)

06/08/2000 28 UNOPPOSED MOTION by dft Jimmie Greene, dft McCreary County, KY to extend time to answer to June 14, 2000 (RBB) (Entered: 06/09/2000)

06/09/2000 -- SUBMITTED re dfts' motion to extend time to answer to June 14, 2000 [28-1] (RBB) (Entered: 06/09/2000)

06/13/2000 29 ORDER by Judge Jennifer B. Coffman: Defts time to answer complaint of plffs shall be extended to June 14, 2000 [28-1] (cc: all counsel) [EOD Date: 6/13/00] (EHM) (Entered: 06/13/2000)

06/14/2000 30 ANSWER by dft Jimmie Greene, dft McCreary County, KY to COMPLAINT [1-1] (NHS) (Entered: 06/14/2000)

06/19/2000 31 ORDER by Judge Jennifer B. Coffman granting dfts' motion for additional 20 days to answer complaint [23-1] (cc: all counsel) [EOD Date: 6/19/00] (RBB) (Entered: 06/19/2000)

06/19/2000 32 ORDER by Judge Jennifer B. Coffman: ORDERED that Colonel Ronald Ray and Theodore H. Jr. attorney for McCreary County, KY, and Jimmie Greene, are granted lv to w/draw as counsel (cc: all counsel) [EOD Date: 6/19/00] (RBB) (Entered: 06/19/2000)

06/19/2000 33 ORDER by Judge Jennifer B. Coffman granting motion for attorney MATHEW D. STAVER to appear pro hac vice [27-1] defendant Jimmie Greene, defendant McCreary County, KY all counsel) [EOD Date: 6/19/00] (RBB) (Entered: 06/19/2000)

06/19/2000 34 ORDER by Judge Jennifer B. Coffman

granting motion for attorney ERIK W. STANLEY to appear pro hac vice [26-1] for defendants Jimmie Greene and McCreary County, KY (cc: all counsel) [EOD Date: 6/19/00] (RBB) (Entered: 06/19/2000)

08/01/2000 35 MOTION by dfts to clarify the preliminary injunction order dated 5/5/00 (RBB) Modified on 08/23/2000 (Entered: 08/02/2000)

08/16/2000 36 TRANSCRIPT filed of HEARING before JENNIFER B. COFFMAN Date(s) of transcript 4/20/00 @ 1:19 p.m. (RBB) (Entered: 08/23/2000)

08/18/2000 37 RESPONSE by plfs to dfts' motion to clarify the preliminary injunction order dated 5/5/00 [35-1] (RBB) (Entered: 08/23/2000)

09/12/2000 -- SUBMITTED re motion to clarify the preliminary injunction order dated 5/5/00 [35-1] is submitted (RBB) (Entered: 09/12/2000)

09/15/2000 38 ORDER by Judge Jennifer B. Coffman denying motion to clarify the preliminary injunction order dated 5/5/00 (cc: all counsel) [EOD Date: 9/18/00] (RBB) (Entered: 09/18/2000)

10/27/2000 39 CERTIFIED COPY of 6CCA Order: dismissing the appeal [16-1]; upon consideration of appellants' mt to voluntarily dismiss the appeals herein (RBB) (Entered: 10/31/2000)

12/07/2000 40 MOTION by plfs Dave Howe, Louanne Walker, ACLU of KY for order holding dfts in contempt , or in the alternative for supplemental preliminary injunction (RBB) (Entered: 12/08/2000)

12/07/2000 41 MEMORANDUM by plfs Dave Howe, Louanne Walker, ACLU of KY in support of motion for order holding dfts in contempt or in the alternative, for supplemental preliminary injunction [40-2] (RBB) (Entered: 12/08/2000)

12/15/2000 42 NOTICE OF FILING by plfs/appellees, Dave Howe, Louanne Walker, ACLU of RELATED DECISION (RBB) (Entered: 12/15/2000)

12/15/2000 43 NOTICE by plf/appellees, Dave Howe, Louanne Walker, ACLU of KY of UNAVAILABILITY DATES TO ATTEND HEARINGS (RBB) (Entered: 12/15/2000)

12/26/2000 44 RESPONSE by dft Jimmie Greene, McCreary County, KY to mtn for order holding dfts in contempt [40-1], to mtn for

supplemental preliminary injunction [40-2] (NHS) (Entered: 12/27/2000)

12/26/2000 45 NOTICE OF FILING by dft Jimmie Greene, McCreary County, KY of affidavit of Judge Jimmie Greene in support of dfts' response to plfs' mtn for contempt, or alternatively, suppl prelim inj (NHS) (Entered: 12/27/2000)

12/26/2000 46 AFFIDAVIT of JIMMIE GREEN re NOTICE OF FILING [45-1], re MEMORANDUM IN OPPOSITION TO PLFS' MTN FOR CONTEMPT or alternatively SUPPL PRELIM INJ [44-1] (NHS) (Entered: 12/27/2000)

01/11/2001 -- SUBMITTED re motion for order holding dfts in contempt [40-1], re motion for supplemental preliminary injunction [40-2] is submitted (NHS) (Entered: 01/11/2001)

01/12/2001 47 ORDER by Judge Jennifer B. Coffman: upon court's own mtn; court deems it in best interest of parties to have matter heard in open court; setting hearing on mtn for order holding dfts in contempt [40-1], mtn for suppl prelim inj [40-2] 3/30/01 at 2:00 p.m. in LONDON ; court will further conduct status conf on 3/30/01 at 2:00 p.m. to further establish course of litigation (cc: all counsel) [EOD Date:

1/16/01] (NHS) (Entered: 01/16/2001)

03/23/2001 48 SUPPLEMENTAL AUTHORITY by dfts Jimmie Greene, McCreary County, KY re dft's response (Memorandum In Opposition) to plf's motion for contempt or supplemental preliminary inj [44-1] (RBB) (Entered: 03/23/2001)

----------VOLUMETHREE----------

03/27/2001 49 NOTICE by dfts Jimmie Greene, McCreary County, KY of filing affidavits of DAVID BARTON AND WILLIAM J. FEDERER (RBB) (Entered: 03/28/2001)

03/27/2001 50 AFFIDAVIT of DAVID BARTON (filed by dfts) in support of dfts' response (opposition) to plfs' mt for contempt or for suppl prelimjinary inj; re [40-1], [40-2], [44-1], [48-1] (RBB) (Entered: 03/28/2001)

03/27/2001 51 AFFIDAVIT of WILLIAM J. FEDERER (filed by dfts) in support of dfts' response (Opposition) to plfs' mt for contempt or for supplemental preliminary inj; [40-1], [40-2], [44-1], [48-1] (RBB) (Entered: 03/28/2001)

04/02/2001 52 ORDER by Judge Jennifer B. Coffman hearing held 3/30/01 before Judge Jennifer B. Coffman ; David A. Friedman and

Laurie Griffith appeared for plfs; Mathew Staver and Johnnie Turner appeared for dfts; Court Reporter: Nathan Perkins; plfs' mtn for contempt DENIED; pts shall attempt to reach stlmt and notify court by 4/30/01; if pts unable to settle, court will issue ruling on plfs' mtn to supplement prelim inj by 5/15/01; if pts unable to settle, plfs shall file amd cmp no later than 30 days after court's ruling; dfts shall file answer to amd cmp no later than 20 days after cmp amd; discovery ddl 6/14/01; s/j mtns due 11/1/01 ; Case consolidated 6:99-cv-507 with member cases 6:99-cv-508, 6:99-cv-509 (cc: all counsel) [EOD Date: 4/2/01] (NHS) Modified on 04/02/2001 (Entered: 04/02/2001)

04/02/2001 -- REMARK: pursuant to Order filed 4/2/01 [52-1], London Civil Nos. 99-507, 99-508 and 99-509 are consolidated and pursuant to instructions from Chambers, 99-507 is to be lead case and all filings shall be filed in 99-507 (RBB) (Entered: 04/20/2001)

04/20/2001 53 MEMORANDUM by dfts Jimmie Greene, McCreary County, KY regarding acceptance of affidavits in opposition to plf's mt for supplemental preliminary injunction; [51-1], [50-1], [48-1], [46-1], [44-1], [40-1] (RBB) (Entered: 04/20/2001)

04/30/2001 54 JOINT MOTION by plfs, dfts, Jimmie Greene, McCreary County, KY, Dave Howe, Louanne Walker, ACLU of KY for enlargement of time to report on settlement negotiations (RBB) (Entered: 05/02/2001)

05/02/2001 -- SUBMITTED re joint motion for enlargement of time to report on settlement negotiations [54-1] is submitted (RBB) (Entered: 05/02/2001)

05/03/2001 55 ORDER by Judge Jennifer B. Coffman granting joint motion for enlargement of time to report on settlement negotiations [54-1]; rpt on status settlement due 5/16/01 (cc: all counsel) [EOD Date: 5/3/01] (NHS) (Entered: 05/03/2001)

05/16/2001 56 NOTICE by dfts Jimmie Greene, McCreary County, KY of Filing REGARDING HISTORICAL DISPLAYS (RBB) (Entered: 05/16/2001)

05/18/2001 57 STATUS REPORT by plfs Dave Howe, Louanne Walker, ACLU of KY; stating parties are unable to settle (RBB) (Entered: 05/21/2001)

05/30/2001 58 MOTION by plfs Dave Howe, Louanne Walker, ACLU of KY to strike affidavits of David Barton and William J. Federer , or in the alternative, for for the Court to

defer consideration of these affidavits until it decides the merits of the case (RBB) (Entered: 05/30/2001)

06/07/2001 59 RESPONSE by dfts, Jimmie Greene, McCreary County, KY to plfs' motion to strike affidavits of David Barton and William J. Federer [58-1], or in the alternative to defer consideration of hte affidavits [58-2] (RBB) (Entered: 06/07/2001)

06/22/2001 60 REPLY by plfs, Dave Howe, Louanne Walker, ACLU of KY to dfts' response to plfs' motion to strike affidavits of David Barton and William J. Federer [58-1] (RBB) (Entered: 06/22/2001)

06/22/2001 61 ORDER by Judge Jennifer B. Coffman: ORDERED plfs' motion to extend the prliminary injunction to the current displays is GRANTED; ORDERED that the displays shall be removed from the McCreary and Pulaski County courthouses and from the Harlan County schools IMMEDIATELY; ORDERED the parties shall submit joint written status reports no later than July 23, 2001, advising court whether they wish order to be the final judgment in this case (cc: all counsel) [EOD Date: 6/22/01] (RBB) (Entered: 06/22/2001)

06/27/2001 -- SUBMITTED re motion to strike affidavits of David Barton and William J. Federer [58-1], re motion for for the Court to defer consideration of these affidavits until it decides the merits of the case [58-2] is submitted (RBB) (Entered: 06/27/2001)

07/18/2001 62 CONSOLIDATED NOTICE OF APPEAL by dfts Jimmie Greene, McCreary County, KY from US District Court decision dated and filed June 22, 2001 (ORDER) [61-1] (cc: all counsel) (RBB) (Entered: 07/19/2001)

07/18/2001 -- RECEIVED re NOTICE OF APPEAL [62-1] fee in amt of $ 105 (Receipt # 089971) (RBB) (Entered: 07/19/2001)

07/19/2001 -- NOTIFICATION to 6CCA; Short Record Mailed, Appeal Package Mailed to Appellant, Copy of Docket Sheet to Parties; in 6:99-cv-00507; (consolidated w/ 6:99-cv-508; 6:99-cv-509) (cc: all counsel) (RBB) (Entered: 07/19/2001)

07/20/2001 63 AMENDED COMPLAINT [1-1] by plfs Dave Howe, Louanne Walker, ACLU of KY, Jane Doe(s), John Doe(s), Jane/John Doe(s), Lawrence Durham, Paul Lee (RBB) (Entered: 07/24/2001)

07/27/2001 64 TRANSCRIPT DESIGNATION and

Ordering Form for dates: 3/31/01 re: transcript [36-1]; and entire hearing on plf's motion for supplemental preliminary injunction (RBB) (Entered: 07/27/2001)

07/31/2001 65 MOTION by dfts, plfs for leave to file late joint status report (RBB) (Entered: 08/06/2001)

07/31/2001 -- PROPOSED JOINT STATUS REPORT tendered by dfts, plfs (RBB) (Entered: 08/06/2001)

08/02/2001 66 NOTIFICATION by 6CCA of Appellate Docket Number 01-5935; Case Manager - Mary Patterson (RBB) (Entered: 08/06/2001)

08/06/2001 -- SUBMITTED re joint motion for leave to file late joint status report [65-1] is submitted (RBB) (Entered: 08/06/2001)

08/09/2001 67 ORDER by Judge Jennifer B. Coffman granting parties joint motion for leave to file late joint status report [65-1] (cc: all counsel) [EOD Date: 8/10/01] (RBB) (Entered: 08/10/2001)

08/09/2001 68 JOINT STATUS REPORT by parties (Constured motion for discovery, construed motion for stay of action, pursuant to Order filed 9/10/01 DE#;72) (RBB) Modified on 09/11/2001 (Entered:

08/10/2001)

----------V O U M E F O U R ----------

08/13/2001 69 ANSWER by dfts Jimmie Greene, McCreary County, KY, Harlan Cty Sch Dist, Don Musselman, Pulaski County, KY, Darrell Beshears to Consolidated Amended Complaint [63-1] (RBB) (Entered: 08/15/2001)

08/20/2001 70 A M E N D E D A N S W E R T O C O N S O L I D A T E D A M E N D E D COMPLAINT [69-1] by defendants (RBB) (Entered: 08/21/2001)

09/06/2001 71 TRANSCRIPT filed of HEARING before JUDGE JENNIFER B. COFFMAN Date(s) of transcript 3/30/01 Ct. Rptr. Nathan F. Perkins (RBB) (Entered: 09/06/2001)

09/10/2001 72 ORDER by Judge Jennifer B. Coffman: matter before court on motion [58] by plfs to strike certain affidavits until after ruling on suppl preliminary injunction, and also upon the joint status report submitted by parties [68-1]; ORDERED motion of plfs regarding affidavits is GRANTED in PART, as it requests this court to defer consideration of the affidavits until after ruling on the suppl preliminary inj, as the court stated in order granting the suppl

preliminary inj that it was not commenting on the truth of the dfts' assertion of the Ten Commandments as a foundational document [61 n. 15), court views this statement as an implicit ruling on the plfs' motion; therefore, this clarification does nothing to alter the status quo w/ regard to the suppl preliminary inj, which is currently being appealed to the Sixth Circuit; FURTHER ORDERED that as the court construes the plfs' statment of position in the joint status report as a motion for discovery, the plfs are hereby directed to file, w/in 15 days of the date of entry of this order, a memo in support of this mt, indicating the purpose of requested discovery and a proposed timeline for the resolution of this case on its merits; response and reply times shall be governed by the local rules; plfs' response to this motion shall also include a proposed timeline for the resolution of this case on its merits; FURTHER ORDERED that, as the court construes the defendants' statement of the position in the joint status report as a motion to stay this action pending resolution of their appeal of the supplemental preliminary inj, the dfts are hereby directed to file, w/in 15 days of the entry of this order, a memo in support of this motion, specifying the grounds therefo, response and reply times shall be governed by the

local rules (cc: all counsel) [EOD Date: 9/11/01] (RBB) (Entered: 09/11/2001)

09/10/2001 73 MOTION by plfs to modify the litigation schedule by extending the discovery ddl from 9/18/01 thru 10/31/01 (RBB) (Entered: 09/13/2001)

09/20/2001 -- SUBMITTED re motion to modify the litigation schedule by extending the discovery ddl from 9/18/01 thru 10/31/01 [73-1] is submitted (RBB) (Entered: 09/20/2001)

09/25/2001 74 MEMORANDUM by plfs in support of Motion For Discovery [68-1]; (status report [68-1] construed as mt for discovery pursuant to Order [72-1]) (RBB) (Entered: 10/04/2001)

09/25/2001 75 MEMORANDUM by dfts in support of dfts' motion to stay proceedings pending resolution of appeal to 6CCA [68-1] ; (status report [68-1] is constured as motion to stay pursuant to order [72-1]) (RBB) (Entered: 10/04/2001)

10/14/2001 76 RESPONSE by plfs to dfts' motion to stay (STATUS REPORT) [68-1] (RBB) (Entered: 10/18/2001)

10/14/2001 77 RESPONSE (MEMORANDUM IN OPPOSITION) by dfts to plf's motion for

discovery [75-1], to [73-1] (RBB) (Entered: 10/18/2001)

12/04/2001 78 ORDER by Judge Jennifer B. Coffman: ORDERED dfts' mt to say is GRANTED and case is STAYED pending resolution of their interlocutory appeal; FURTHER ORDERED plfs' mt for discovery is DENIED; ORDERED pfs' mt to modify litigation schedule is DENIED AS MOOT (cc: all counsel) [EOD Date: 12/5/01] (RBB) (Entered: 12/05/2001)

12/04/2001 -- Case Stayed 12/4/2001 (SKV) (Entered: 03/16/2003)

01/08/2004 79 LETTER from USCA with corrected page for publication version of decision sent on 12/18/2003. (JMB) (Entered: 01/08/2004)

03/23/2004 80 ORDER: The Ct of Appeals having affirmed this ct's order granting preliminary injunction, it is ORDERED that parties shall file w/ this ct a status report w/i 30 days of entry of this order. . Signed by Judge Jennifer B Coffman. (JMB)cc: COR (Entered: 03/23/2004)

03/29/2004 81 MOTION to Lift Stay by American Civil Liberties Union of Kentucky (JMB) (Entered: 03/29/2004)

04/08/2004 82 DEFENDANT'S MEMORANDUM in

Opposition re [81] MOTION to Lift Stay by American Civil Liberties Union of Kentucky filed by Darrell Beshears, Jimmie Greene, Harlan County School District, McCreary County, KY, Don Musselman, Pulaski County, KY. (JMB) (Entered: 04/08/2004)

04/08/2004 83 DEFENDANT'S STATUS REPORT by Darrell Beshears, Jimmie Greene, Harlan County School District, McCreary County, KY, Don Musselman, Pulaski County, KY. (JMB) (Entered: 04/08/2004)

04/09/2004 84 MANDATE of USCA as to [62] Notice of Appeal filed by McCreary County, KY, Jimmie Greene: Order of the District Court is AFFIRMED. (JMB) (Entered: 04/09/2004)

04/23/2004 85 PLAINTIFFS' STATUS REPORT by American Civil Liberties Union of Kentucky, Lawrence Durham, Dave Howe, Paul Lee, Louanne Walker. (JMB) (Entered: 04/23/2004)

04/23/2004 86 REPLY to Response to Motion re [81] MOTION to Lift Stay by American Civil Liberties Union of Kentucky filed by American Civil Liberties Union of Kentucky, Lawrence Durham, Dave Howe, Paul Lee, Louanne Walker. (JMB) (Entered: 04/23/2004)

04/23/2004 -- ***MOTION SUBMITTED TO CHAMBERS FOR REVIEW: [81] MOTION to Lift Stay by American Civil Liberties Union of Kentucky (JMB) (Entered: 04/23/2004)

05/11/2004 87 ORDER: Defs' response [82] to plff's mt to lift stay is CONSTRUED as mt to extend stay; that mt is GRANTED. Action is stayed pending resolution of defs' petition for certiorari; FURTHER ORDERED that plffs' mt to lift stay [81] is DENIED. FURTHER ORDERED that parties shall file w/ ct a status report w/i 20 days of resolution of petition for certiorari. Motions terminated: [81] MOTION for Order by American Civil Liberties Union of Kentucky filed by American Civil Liberties Union of Kentucky.. Signed by Judge Jennifer B Coffman. (JMB)cc: COR Modified text on 5/21/2004 (Brock, Jacqueline). (Entered: 05/11/2004)

05/26/2004 88 Mail Returned as Undeliverable. (Order of 5/11/2004) Mail sent to KATHLEEN M. FLYNN. (EHM) (Entered: 05/26/2004)

10/18/2004 89 STATUS REPORT by Defendants Darrell Beshears, Jimmie Greene, Harlan County School District, McCreary County, KY, Don Musselman, Pulaski County, KY. (JMB) (Entered: 10/18/2004)

10/18/2004 -- Clerk's Note: FILE SUBMITTED to Chambers for review re [89] Status Report. (JMB) (Entered: 10/18/2004)

10/21/2004 90 ORDER re [89] Status Report filed by Harlan County School District, McCreary County, KY, Pulaski County, KY, Jimmie Greene, Don Musselman, Darrell Beshears: Dfts have filed status report [89] which this court construes as a motion to continue stay now imposed on these consolidaed cases, it is ORDERED that the status report be docketed as above construed. IT IS FURTHER ORDERED that response and reply ddls re the mt shall run according to Jt Local Rules for EDKY and WDKY.. Signed by Judge Jennifer B Coffman. (JMB)cc: COR (Entered: 10/22/2004)

10/21/2004 89 MOTION to Continue Stay by Harlan County School District, McCreary County, KY, Don Musselman, Pulaski County, KY (JMB) (Entered: 10/22/2004)

10/25/2004 91 LETTER from 6CCA with attached notice from Supreme Ct stating that Petition for Writ of Certiorari is granted. (JMB) (Entered: 10/25/2004)

11/02/2004 92 Mail (order of 10/21/04) Returned as Undeliverable. Mail sent to Kathleen M. Flynn (SWA) (Entered: 11/02/2004)

11/15/2004	--	***MOTION SUBMITTED TO CHAMBERS FOR REVIEW: [89] MOTION to Continue Stay by Harlan County School District, McCreary County, KY, Don Musselman, Pulaski County, KY (JMB) (Entered: 11/15/2004)
11/19/2004	93	ORDER re [89] MOTION to Continue by Harlan County School District, McCreary County, KY, Don Musselman, Pulaski County, KY filed by Harlan County School District, McCreary County, KY, Pulaski County, KY, Don Musselman: ORDERED that dfts' mt for extension of stay is GRANTED. Action is stayed pending decision of US Supreme Ct. FURTHER ORDERED that parties shall file w/ ct status report w/i 20 days of US Supreme Ct's decision. Motions terminated: [89] MOTION to Continue by Harlan County School District, McCreary County, KY, Don Musselman, Pulaski County, KY filed by Harlan County School District, McCreary County, KY, Pulaski County, KY, Don Musselman.. Signed by Judge Jennifer B Coffman. (JMB)cc: COR (Entered: 11/19/2004)

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY (LONDON)
CIVIL DOCKET FOR CASE #: 6:99-cv-00509-JBC

Date	#	Description
11/18/1999	1	COMPLAINT (1 summons issued) with copy given to atty for service of process, Fee Paid $ 150, Receipt No. 082264 (RBB) (Entered: 11/19/1999)
11/18/1999	2	MOTION by plaintiff ACLU of KY, plaintiff Lawrence Durham, plaintiff Paul Lee for preliminary injunction (RBB) (Entered: 11/19/1999)
11/18/1999	3	MEMORANDUM by plaintiff ACLU of KY, plaintiff Lawrence Durham, plaintiff Paul Lee in support of motion for preliminary injunction [2-1] (RBB) (Entered: 11/19/1999)
12/03/1999	4	RETURN OF SERVICE executed upon defendant Pulaski County, KY on 11/22/99; service by certified mail; return rcpt requested (RBB) (Entered: 12/14/1999)
12/21/1999	5	MOTION by defendant Pulaski County, KY, Official Defendant Darrell Beshears to dismiss complaint (RBB) (Entered: 12/22/1999)

12/21/1999	6	MEMORANDUM by defendant Pulaski County, KY, Official Defendant Darrell Beshears in support of motion to dismiss complaint [5-1] (RBB) (Entered: 12/22/1999)
01/05/2000	7	ORDER by Judge Jennifer B. Coffman: that plfs shall have until 1/23/00 to file a response to dfts' motion to dismiss (cc: all counsel) [EOD Date: 1/6/00] (RBB) (Entered: 01/06/2000)
01/10/2000	8	AGREED MOTION by plaintiff, defendant, Official Defendant for extension until and including 1/23/00 to repsond to dfts' motion to dismiss (NHS) (Entered: 01/12/2000)
01/12/2000	--	SUBMITTED re motion for extension until and including 1/23/00 to repsond to dfts' motion to dismiss [8-1] is submitted (NHS) (Entered: 01/12/2000)
02/09/2000	9	MOTION by plaintiff ACLU of KY, plaintiff Lawrence Durham, plaintiff Paul Lee for leave to file consolidated reply/ response memoranda ; stating dfts consent to additional extension of time (RBB) (Entered: 02/11/2000)
02/09/2000	--	PROPOSED REPLY/RESPONSE MEMORANDA tendered by plaintiff ACLU of KY, plaintiff Lawrence Durham,

		plaintiff Paul Lee (RBB) (Entered: 02/11/2000)
02/11/2000	--	SUBMITTED re motion for leave to file consolidated reply/ response memoranda [9-1] is submitted (RBB) (Entered: 02/11/2000)
03/02/2000	10	ORDER by Judge Jennifer B. Coffman: plfs' motion for leave to file consolidated reply/ response memoranda [9-1] GRANTED; plfs have until 2/9/00 to file consolidated reply memorandum in support of motion for preliminary injunction and response memorandum in opposition to dfts' motion to dismiss (cc: all counsel) [EOD Date: 3/3/00] (NHS) (Entered: 03/03/2000)
03/02/2000	11	(CONSOLIDATED) RESPONSE by plaintiff ACLU of KY, plaintiff Lawrence Durham, plf Paul Lee to motion dft's to dismiss complaint [5-1] (RBB) Modified on 03/22/2000 (Entered: 03/22/2000)
03/02/2000	11	REPLY by plaintiff ACLU of KY, plaintiff Lawrence Durham, plaintiff Paul Lee to (dft's response) to plfs' motion for preliminary injunction [2-1] (RBB) (Entered: 03/22/2000)
03/20/2000	12	MOTION by defendant Pulaski County, KY, Official Defendant Darrell Beshears

for oral argument (RBB) Modified on 03/22/2000 (Entered: 03/22/2000)

03/20/2000 13 MEMORANDUM by defendant Pulaski County, KY, Official Defendant Darrell Beshears in support of motion for oral argument [11-1]; ATTACHMENTS FILED IN SEP. VOL. (RBB) Modified on 03/22/2000 (Entered: 03/22/2000)

03/20/2000 13 REPLY by defendant Pulaski County, KY, Official Defendant Darrell Beshears to plf's response to motion to dismiss complaint [5-1] (RBB) (Entered: 03/22/2000)

03/20/2000 13 (MEMORANDUM) RESPONSE (to CONSOLIDATED REPLY) by defendant Pulaski County, KY, Official Defendant Darrell Beshears to plfs' motion for preliminary injunction [2-1] (RBB) (Entered: 03/22/2000)

03/22/2000 -- SUBMITTED re dfts' motion to dismiss complaint [5-1], re plfs' motion for preliminary injunction [2-1] is submitted (RBB) (Entered: 03/22/2000)

03/27/2000 14 ORDER by Judge Jennifer B. Coffman: ORDERED that this matter is scheduled for hearing on April 20, 2000 at 01:00 p.m. (cc: all counsel) [EOD Date: 3/27/00] (RBB) (Entered: 03/27/2000)

04/20/2000 15 GENERAL MINUTES: (COPY--original filed in 99-cv-507) before Judge Jennifer B. Coffman; Date(s) 4/20/00; Court Reporter Nathan Perkins; in-court hearing held 4/20/00 ; Laurie Griffith, David Friedman, Kathleen M. Flynn for plfs; Theodore Amshoff, Ronald Ray, Johnnie for dfts; taking under advisement the motion to dismiss complaint [5-1], taking under advisement the motion for preliminary injunction [2-1] (cc: all counsel) [EOD Date: 4/21/00] (NHS) Modified on 04/24/2000 (Entered: 04/21/2000)

05/05/2000 16 ORDER by Judge Jennifer B. Coffman: ORDERED that plfs' motion for a preliminary injunction is DENIED; FURTHER ORDERED that the Ten Commandments display shall be removed from the Pulaski County Courthouse IMMEDIATELY; FURTHER ORDERED that neither the defendant Darrell Beshears nor any other Pulaski County official, acting in their official capacity, shall erect or cause to be erected similar displays w/in Pulaski County, Kentucky (cc: all counsel) [EOD Date: 5/5/00] (RBB) (Entered: 05/05/2000)

05/05/2000 -- RECEIVED re NOTICE OF APPEAL [17-1] fee in amount of $ 105 (Receipt # 083386) (RBB) (Entered: 05/11/2000)

----------V O L U M E 2----------

05/10/2000	17	NOTICE OF APPEAL by defendant Pulaski County, KY, Official Defendant Darrell Beshears from Dist. Court ORDER OF 5/5/00 [16-1] (cc: all counsel) (RBB) (Entered: 05/11/2000)
05/10/2000	18	MOTION by defendant Pulaski County, KY, Official Defendant Darrell Beshears for order to stay preliminary injunction during pendency of appeal (RBB) (Entered: 05/12/2000)
05/10/2000	19	MEMORANDUM by dft Pulaski County, KY, Official Dft Darrell Beshears in support of motion for order to stay preliminary injunction during pendency of appeal [18-1] (RBB) (Entered: 05/12/2000)
05/11/2000	--	NOTIFICATION to 6CCA; Short Record Mailed, Appeal Package Mailed to Appellant, Copy of Docket Sheet to Parties; [17-1] (cc: all counsel) (RBB) Modified on 05/11/2000 (Entered: 05/11/2000)
05/12/2000	20	ORDER by Judge Jennifer B. Coffman: ORDERED that dfts' motion for order to stay preliminary injunction during pendency of appeal [18-1] is DENIED; FURTHER ORDERED that plfs need not

		respond to dfts' mt for a stay (cc: all counsel) [EOD Date: 5/12/00] (RBB) (Entered: 05/12/2000)
05/15/2000	21	MOTION by defendant Pulaski County, KY, Official Defendant Darrell Beshears for order to stay preliminary inj during pendency of mt to 6CCA for stay pending appeal (RBB) (Entered: 05/18/2000)
05/22/2000	22	ORDER by Judge Jennifer B. Coffman: IT IS SO ORDERED: finding the defts' motion for order to stay preliminary inj during pendency of mt to 6CCA for stay pending appeal [21-1] moot (cc: all counsel) [EOD Date: 5/22/00] (EHM) (Entered: 05/22/2000)
05/25/2000	23	CERTIFIED COPY of 6CCA Order: ORDERED that dfts' mts for stays pending the appeal of the preliminary injunctions issued by the district court are denied (RBB) (Entered: 05/25/2000)
05/25/2000	24	MOTION by defendant Pulaski County, KY, Official Defendant Darrell Beshears to extend time to answer (RBB) (Entered: 05/30/2000)
05/25/2000	25	MOTION by defendant Pulaski County, KY, Official Defendant Darrell Beshears to withdraw attorney Colonel Ronald Ray and Theodore H. Amshoff, Jr. (RBB)

(Entered: 05/30/2000)

05/30/2000 26 NOTIFICATION by 6CCA of Appellate Docket Number 00-5636; Case Manager - Mary Patterson (SKV) (Entered: 05/30/2000)

06/06/2000 27 MOTION by dft Pulaski County, KY, Darrell Beshears for attorney ERIK W. STANLEY to appear hac vice (RBB) (Entered: 06/07/2000)

06/06/2000 28 MOTION by dft Pulaski County, KY, Darrell Beshears for attorney MATHEW D. STAVER to appear pro hac vice (RBB) (Entered: 06/07/2000)

06/06/2000 -- FEE PAID $ 130; Receipt No. 083470 for PHV fee for attorney Stanley and Staver -- (RBB) (Entered: 06/07/2000)

06/07/2000 -- SUBMITTED re motion for attorney MATHEW D. STAVER to appear pro hac vice [28-1], re motion for attorney ERIK W. to appear hac vice [27-1], re motion to withdraw attorney Colonel Ronald Ray and Theodore H. Amshoff, Jr. [25-1], re motion to extend time to answer [24-1] is submitted (RBB) (Entered: 06/07/2000)

06/08/2000 29 UNOPPOSED MOTION by dft Pulaski County, KY, Dft Darrell Beshears to extend time to answer until June 14, 2000

(RBB) (Entered: 06/09/2000)

06/09/2000 -- SUBMITTED re motion to extend time to answer until June 14, 2000 [29-1] is submitted (RBB) (Entered: 06/09/2000)

06/13/2000 30 ORDER by Judge Jennifer B. Coffman granting dft's mt to extend time to ans until 6/14/00 [29-1] (cc: all counsel) [EOD Date: 6/13/00] (RBB) (Entered: 06/13/2000)

06/13/2000 31 ORDER by Judge Jennifer B. Coffman granting motion for atty MATHEW D. STAVER to appear pro hac vice [28-1] dft Pulaski County, KY, Darrell Beshears (cc: all counsel) [EOD Date: 6/13/00] (RBB) (Entered: 06/13/2000)

06/13/2000 32 ORDER by Judge Jennifer B. Coffman granting motion for atty ERIK W. STANLEY to appear hac vice [27-1] for dfts Pulaski County, KY, Darrell Beshears (cc: all counsel) [EOD Date: 6/13/00] (RBB) (Entered: 06/13/2000)

06/14/2000 33 ANSWER by dft Pulaski County, KY, ofc dft Darrell Beshears to COMPLAINT [1-1] (NHS) (Entered: 06/14/2000)

06/14/2000 34 ORDER by Judge Jennifer B. Coffman: granting motion to withdraw attorney Colonel Ronald Ray and Theodore H.

Amshoff, Jr. [25-1] for Darrell Beshears, Pulaski County, KY (cc: all counsel) [EOD Date: 6/15/00] (NHS) (Entered: 06/15/2000)

08/01/2000 35 MOTION by dfts to clarify the preliminary injunction order dated 5/5/00 (RBB) Modified on 08/23/2000 (Entered: 08/02/2000)

08/16/2000 36 (COPY) TRANSCRIPT filed of HEARING before JENNIFER B. COFFMAN Date(s) of transcript 04/20/00; TRANSCRIPT FILED IN 99-507 RECORD (RBB) Modified on 08/23/2000 (Entered: 08/23/2000)

08/18/2000 37 RESPONSE by plfs to dfts' motion to clarify the preliminary injunction order dated 5/5/00 [35-1] (RBB) (Entered: 08/23/2000)

09/12/2000 -- SUBMITTED re motion to clarify the preliminary injunction order dated 5/5/00 [35-1] is submitted (RBB) (Entered: 09/12/2000)

09/15/2000 38 ORDER by Judge Jennifer B. Coffman denying motion to clarify the preliminary injunction order dated 5/5/00 (cc: all counsel) [EOD Date: 9/18/00] (RBB) (Entered: 09/18/2000)

09/27/2000 39 NOTICE by plaintiff of SUGGESTION OF DEATH of plf Paul Lee (RBB) (Entered: 09/27/2000)

10/27/2000 40 CERTIFIED COPY of 6CCA Order: dismissing the appeal [17-1]; upon consideration of appellants' consolidated mt to voluntarily dismiss appeal (RBB) (Entered: 10/31/2000)

12/07/2000 41 MOTION by plfs Paul Lee, Lawrence Durham, ACLU of KY for order holding dfts in contempt , or for supplemental preliminary injunction (RBB) (Entered: 12/08/2000)

12/07/2000 42 MEMORANDUM by plfs Paul Lee, Lawrence Durham, ACLU of KY in support of motion for order holding dfts in contempt of motion for supplemental preliminary injunction [41-2] (RBB) (Entered: 12/08/2000)

12/15/2000 43 NOTICE by plfs/appellees, Paul Lee, Lawrence Durham, ACLU of KY OF RELATED DICISION (RBB) (Entered: 12/15/2000)

12/15/2000 44 NOTICE by plfs/appellees, Paul Lee, Lawrence Durham, ACLU of KY, of COUNSEL'S UNAVAILABILITY TO ATTEND HRGS ON CERTAIN DATES (RBB) (Entered: 12/15/2000)

12/26/2000 45 RESPONSE by ofc dft Darrell Beshears, dft Pulaski County, KY to mtn for order holding dfts in contempt [41-1], to mtn for supplemental preliminary injunction [41-2] (NHS) (Entered: 12/27/2000)

12/26/2000 46 NOTICE OF FILING by ofc dft Darrell Beshears, dft Pulaski County, KY of affidavit of JUDGE DARRELL BESHEARS in support of dfts' opposition to plfs' mtn for contempt, or alternatively for suppl prelim inj (NHS) (Entered: 12/27/2000)

12/26/2000 47 AFFIDAVIT of JUDGE DARRELL BESHEARS re NOTICE OF FILING [46-1], re DFTS' OPPOSITION TO PLFS' MTN FOR CONTEMPT or alternatively, for SUPPL PRELIM INJ [45-1] (NHS) (Entered: 12/27/2000)

01/11/2001 -- SUBMITTED re motion for order holding dfts in contempt [41-1], re motion for supplemental preliminary injunction [41-2] is submitted (NHS) (Entered: 01/11/2001)

01/12/2001 48 ORDER by Judge Jennifer B. Coffman: upon court's own mtn, court deems it in best interest of parties to have mtns [41], [42] heard in open court; setting hearing on mtn for order holding dfts in contempt [41-1], mtn for suppl prelim inj [41-2] for

3/30/01 at 2:00 p.m. in LONDON ; court will also conduct status conf on 3/30/01 at 2:00 p.m. to establish course of litigation (cc: all counsel) [EOD Date: 1/16/01] (NHS) (Entered: 01/16/2001)

03/23/2001 49 SUPPLEMENTAL AUTHORITY by dft Darrell Beshears, Pulaski County, KY re dft's response (Memo In Opposition) to plf's motion for contempt or for suppl preliminary inj [45-1] (RBB) (Entered: 03/23/2001)

---------- VOLUMETHREE ----------

03/27/2001 50 NOTICE by dfts Darrell Beshears, Pulaski County, KY of filing AFFIDAVITS OF DAVID BARTON & WILLIAM J. FEDERER (RBB) (Entered: 03/28/2001)

03/27/2001 51 AFFIDAVIT of DAVID BARTON (filed by dfts) in support of dfts' response (opposition) to plfs' mt for contempt or for suppl preliminary inj; [41-1], [41-2], [45-1], [49-1] (RBB) (Entered: 03/28/2001)

03/27/2001 52 AFFIDAVIT of WILLIAM J. FEDERER (filed by dfts) in support of dfts' response (opposition) to plfs' mt for contempt or for suppl preliminary inj; [41-1], [41-2], [45-1], [49-1] (RBB) (Entered: 03/28/2001)

04/02/2001	53	ORDER by Judge Jennifer B. Coffman: hearing held 3/30/01 before Judge Jennifer B. Coffman ; David A. Friedman and Laurie Griffith appeared for plfs; Mathew Staver and Johnnie Turner appeared for dfts; Court Reporter: Nathan Perkins; plfs' mtn for contempt [41-1] DENIED; plfs' oral mtn to consolidate cases GRANTED; Case consolidated w/ 99-507, 99-508, 99-509 w/all pleadings to be filed in 99-507 ; pts shall attempt to reach stlmt of case and notify court by 4/30/01; if pts unable to settle court will issue ruling on plfs mtn to supplement prelim inj by 5/15/01; if pts unable to settle, plfs shall file amd cmp no later than 30 days after court's ruling; dfts shall file ans to amd cmp no later than 20 days after cmp amended; discovery ddl 9/2/01; s/j mtn ddl 11/1/01 (cc: all counsel) [EOD Date: 4/2/01] (NHS) (Entered: 04/02/2001)
04/02/2001	--	REMARK: pursuant to order filed 4/2/01, London Civil Nos. 99-507, 99-508 and 99-509 are consolidated and Chambers has orally designated 99-507 as the lead case; all further pleadings are to be filed in 99-507 (RBB) (Entered: 04/20/2001)
07/18/2001	--	CORRECTED DOCKET ENTRY TO SHOW CONSOLIDATED NOTICE OF INTERLOCUTORY APPEAL by Darrell Beshears, Pulaski County, KY filed in

Lead Case 99-507(SKV) (Entered: 07/23/2003)

US COURT OF APPEALS FOR THE SIXTH CIRCUIT
CASE SUMMARY
COURT OF APPEALS DOCKET #: 01-5935

Date	Description
7/26/01	Civil Case Docketed. Notice filed by Appellants McCreary Cnty, Jimmie Greene, Harlan Cnty School, Tim Saylor, Pulaski Cnty, Darrell Beshears. Transcript needed: y (mcp)
7/27/01	APPEARANCE filed by Attorney Mathew D. Staver for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty [01-5935] (mcp)
7/27/01	APPEARANCE filed by Attorney Erik W. Stanley for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty [01-5935] (mcp)
7/27/01	TRANSCRIPT ORDER FORM filed by Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty: court reporter Nathan Perkins, transcript ordered on 07/27/01 [01-5935] [2397637-1] response due by 8/6/01 for Nathan Perkins [01-5935] (blh)

8/6/01	PRE-ARGUMENT STATEMENT filed by Erik W. Stanley for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty [01-5935] (mcp)
8/8/01	APPEARANCE filed by Attorney David A. Friedman for Appellees Paul Lee, Lawrence Durham, Jane Doe, Thomas Doe, Sarah Doe, David Howe, LouAnne Walker, ACLU [01-5935] (mcp)
8/16/01	LETTER SENT by blh to Court Reporter Nathan Perkins regarding transcript. Transcript was ordered on 7/27/01; no confirmation. response due by 8/27/01 for Nathan Perkins [01-5935] (blh)
9/6/01	TRANSCRIPT ORDER completed by court reporter Nathan Perkins for Document [2397637-1] transcript involving, Mathew D. Staver, Nathan Perkins. Number of pages: 95 per telephone conversation with ctr. [01-5935] (blh)
9/10/01	BRIEFING LETTER SENT setting briefing schedule: appellant proof brief due 10/22/01 ; appellee proof brief due 11/21/01 ; reply proof brief due 12/5/01 ; appendix due 12/12/01 ; final briefs due 1/2/02 . [01-5935] . (mcp)
9/24/01	APPEARANCE filed by Attorney Johnnie L. Turner for Appellants Darrell Beshears,

Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty [01-5935] (mcp)

10/15/01 Appellant MOTION filed to extend time to file brief for 4 days until 10/26/01. Motion filed by Mathew D. Staver for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty. Certificate of service date 10/12/01 [01-5935] (mcp)

10/16/01 LETTER SENT by mcp granting motion to extend briefing [2439749-1] filed by Mathew D. Staver. Resetting briefing schedule: [01-5935] appellant proof brief due now 10/26/01; appellee proof brief now due 11/26/01; reply proof brief due 12/10/01; appendix now due 12/17/01; final briefs now due 1/7/02 ; (mcp)

10/26/01 PROOF BRIEF filed by Johnnie L. Turner , Erik W. Stanley , Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty. Certificate of service date 10/25/01 Number of Pages: 76. [01-5935] (lak)

10/26/01 Request to require oral argument filed by Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant

Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty [01-5935] (lak)

11/5/01 BRIEF filed by David R. Huggins for Amicus Curiae Natl Legal Fndtn in support of Appellant. Copies 7. Certificate of service date 11/2/01. Number of Pages: 38. (Page 1 of brief indicates "The National Legal Foundation has authority to file this amicus brief pursuant to the consent of both parties".) [01-5935] (mcp)

11/19/01 APPEARANCE filed by Attorney David R. Huggins for Amicus Curiae Natl Legal Fndtn [01-5935] (mcp)

11/30/01 Appellee MOTION filed to file brief instanter. Motion filed by David A. Friedman for Appellee Paul Lee, Appellee Lawrence Durham, Appellee Thomas Doe, Appellee Sarah Doe, Appellee David Howe, Appellee LouAnne Walker, Appellee ACLU. Certificate of service date 11/27/01 . [01-5935] (lak)

11/30/01 PROOF BRIEF filed by David A. Friedman for Appellee Paul Lee, Appellee Lawrence Durham, Appellee Thomas Doe, Appellee Sarah Doe, Appellee David Howe, Appellee LouAnne Walker, Appellee ACLU. Certificate of service date 11/27/01. Number of Pages: 65. [01-5935] (lak)

11/30/01 Request to require oral argument filed by David A. Friedman for Appellee Paul Lee, Appellee Lawrence Durham, Appellee Thomas Doe, Appellee Sarah Doe, Appellee David Howe, Appellee LouAnne Walker, Appellee ACLU [01-5935] (lak)

12/3/01 LETTER SENT by lak granting motion to file brief instanter [2465340-1] filed by David A. Friedman [01-5935] (lak)

12/7/01 Copy of District Court Order of 12/4/2001 filed. Defendants' motion to stay is granted and this case is hereby stayed pending resolution of their interlocutory appeal. [01-5935] (mcp)

12/10/01 PROOF REPLY BRIEF filed by Johnnie L. Turner , Erik W. Stanley , Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty Certificate of service date 12/7/01 [01-5935] (lak)

12/17/01 APPENDIX filed by Johnnie L. Turner for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, ,Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School,

Appellant Jimmie Greene, Appellant McCreary Cnty. Copies: 5. Certificate of service date 12/13/01 [01-5935] (lak)

1/4/02 FINAL BRIEF filed by Johnnie L. Turner , Erik W. Stanley , Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty. Copies: 7. Certificate of service date 1/3/02 Number of Pages: 74. [01-5935] (lak)

1/4/02 Request to require oral argument filed by Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty [01-5935] (lak)

1/4/02 FINAL REPLY BRIEF filed by Johnnie L. Turner for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty, Erik W. Stanley for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene, Appellant McCreary Cnty, Mathew D. Staver for Appellant Darrell Beshears, Appellant Pulaski Cnty, Appellant Tim Saylor, Appellant Harlan Cnty School, Appellant Jimmie Greene,

Appellant McCreary Cnty. Copies: 7 Certificate of service date 1/3/02 Number of Pages: 38. [01-5935] (lak)

1/9/02 FINAL BRIEF filed by C. Laurie Griffith , David A. Friedman for Appellee Paul Lee, Appellee Lawrence Durham, Appellee Thomas Doe, Appellee Sarah Doe, Appellee David Howe, Appellee LouAnne Walker, Appellee ACLU. Copies: 7. Certificate of service date 1/7/02 . Number of Pages: 65. [01-5935] (lak)

1/9/02 Request to require oral argument filed by David A. Friedman for Appellee Paul Lee, Appellee Lawrence Durham, Appellee Thomas Doe, Appellee Sarah Doe, Appellee David Howe, Appellee LouAnne Walker, Appellee ACLU [01-5935] (lak)

2/25/02 ADDITIONAL CITATION filed by David A. Friedman for Appellees Paul Lee, Lawrence Durham, Thomas Doe, Sarah Doe, David Howe, LouAnne Walker, ACLU. Certificate of service date 2/22/02 [01-5935] (mcp)

3/11/02 ADDITIONAL CITATION filed by David A. Friedman for Appellees Paul Lee, Lawrence Durham, Thomas Doe, Sarah Doe, David Howe, LouAnne Walker, ACLU. Certificate of service date 3/8/02 [01-5935] (mcp)

5/6/02 NOTICE of unavailability during the week of 5/27/02 through 5/31/02, notice filed by Mathew D. Staver for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, Certificate of service date 5/2/02 [01-5935] (mcp)

8/29/02 NOTICE of unavailability filed by Mathew D. Staver for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty. Counsel unavailable for argument 9/2-6 & 16-20, 10/14-31, 11/1,12,18,25,27-29 & 12/23 -1/3/03. Certificate of service date 8/26/02 [01-5935] (mcp)

9/12/02 Oral argument date set for December 4, 2002 in court room 607. Notice of argument sent to counsel. [01-5935] (rld)

9/25/02 ADDITIONAL CITATION filed by Erik W. Stanley for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty. Certificate of service date 9/24/02 [01-5935] (mcp)

10/15/02 ADDITIONAL CITATION filed by Erik W. Stanley for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, McCreary Cnty. Certificate of service date 10/9/02 [01-5935] (mcp)

11/1/02 ADDITIONAL CITATION filed by Erik W. Stanley for Appellants Darrell Beshears, Pulaski Cnty, Tim Saylor, Harlan Cnty School, Jimmie Greene, and McCreary Cnty. Certificate of service date 10/29/02 [01-5935] (yh)

11/27/02 ADDITIONAL CITATION filed by Erik W. Stanley for Appellants McCreary Cnty, Jimmie Greene, Harlan Cnty School,Tim Saylor, Pulaski Cnty, Darrell Beshears. Certificate of service date 11/26/02 [01-5935] (mcp)

12/4/02 CAUSE ARGUED on 12/4/02 by Mathew D. Staver for Appellant McCreary Cnty, Appellant Jimmie Greene, Appellant Harlan Cnty School, Appellant Tim Saylor, Appellant Pulaski Cnty, Appellant Darrell Beshears, David A. Friedman for Appellee ACLU, Appellee LouAnne Walker, Appellee David Howe, Appellee Sarah Doe, Appellee Thomas Doe, Appellee Lawrence Durham, Appellee Paul Lee before Judges Ryan, Clay, Gibbons. [01-5935] (srw)

7/21/03 ADDITIONAL CITATION filed by David A. Friedman for Appellees ACLU, LouAnne Walker, David Howe, Sarah Doe, Thomas Doe, Lawrence Durham, Paul Lee. Certificate of service date 7/18/03 [01-5935] (mcp)

9/18/03 Supplemental Authority filed by David A.

Friedman for Appellees ACLU, LouAnne Walker, David Howe, Sarah Doe, Thomas Doe, Lawrence Durham, Paul Lee. Certificate of service date 9/16/03 [01-5935] (mcp)

11/17/03 ADDITIONAL CITATION filed by Mathew D. Staver for Appellants McCreary Cnty, Jimmie Greene, Harlan Cnty School, Tim Saylor, Pulaski Cnty, Darrell Beshears. Certificate of service date 11/14/03 [01-5935] (mcp)

12/18/03 OPINION filed : AFFIRMED, decision for publication pursuant to local rule 206 [01-5935] . James L. Ryan, Circuit Judge, dissenting; Eric L. Clay, Authoring Circuit Judge; Julia S. Gibbons, Circuit Judge, concurring. (jmb)

12/18/03 JUDGMENT : AFFIRMED . (jmb)

12/23/03 Appellant MOTION filed to extend time to 1/16/04 to file a petition for rehearing en banc. Motion filed by Erik W. Stanley for Appellants McCreary Cnty, Jimmie Greene, Harlan Cnty School, Tim Saylor, Pulaski Cnty, Darrell Beshears. Certificate of service date 12/22/03 [01-5935] (blh)

12/23/03 RULING granting motion to extend time to 1/16/04 to file a petition for rehearing en banc [2874311-1] filed by Erik W. Stanley. Petition to be filed by 1/16/04. [01-5935] (blh)

1/5/04 OPINION CORRECTION LETTER sent indicating revisions to published opinion filed 12/18/03 [01-5935] (mcp)

1/16/04 PETITION for en banc rehearing filed by Erik W. Stanley for Appellants McCreary Cnty, Jimmie Greene, Harlan Cnty School, Tim Saylor, Pulaski Cnty, Darrell Beshears. Certificate of service date 1/14/04. [01-5935] (blh)

1/22/04 LETTER SENT by blh to David A. Friedman for Appellees ACLU, LouAnne Walker, David Howe, Sarah Doe, Thomas Doe, Lawrence Durham, Paul Lee notifying that party is directed to respond to a petition for en banc rehearing [2886377-1] filed by Erik W. Stanley. Response due by 2/5/04. [01-5935]. (blh)

2/5/04 RESPONSE to a petition for en banc rehearing [2886377-1] filed by Erik W. Stanley. Response filed by David A. Friedman for Appellees ACLU, LouAnne Walker, David Howe, Sarah Doe, Thomas Doe, Lawrence Durham, Paul Lee. Certificate of service date 2/5/04 . [01-5935] (blh)

3/23/04 ORDER filed denying petition for en banc rehearing [2886377-1] filed by Erik W. Stanley, decision for publication. [01-5935] Entered by order of the court. Judge Clay concurring, joined by Judge Martin; Chief

Judge Boggs dissenting, joined by Judge Batchelder. (blh)

3/24/04 LETTER SENT by Deputy Clerk to David A. Friedman, Mathew D. Staver, Johnnie L. Turner, Erik W. Stanley & David R. Huggins. Enclosing a copy of a published order filed 3/23/04. [01-5935] . (mcp)

4/7/04 MANDATE ISSUED with no cost taxed [01-5935] (lak)

4/8/04 Appellant MOTION filed to stay mandate pending the filing of a Petition for Writ of Ceriorari. Motion filed by Erik W. Stanley for Appellants McCreary Cnty, Jimmie Greene, Harlan Cnty School, Tim Saylor, Pulaski Cnty, Darrell Beshears. Certificate of service date 4/5/04 [01-5935] (mcp)

4/16/04 Appellant MOTION filed to recall mandate and stay mandate pending the filing of a petition for writ of certiorari. Motion filed by Erik W. Stanley for Appellants McCreary Cnty, Jimmie Greene, Harlan Cnty School, Tim Saylor, Pulaski Cnty, Darrell Beshears. Certificate of service date 4/15/04 [01-5935] (mcp)

5/19/04 ORDER filed denying motion to stay mandate [2938748-1] and denying motion to recall mandate [2938752-1] filed by Erik W. Stanley [01-5935] . James L. Ryan, Circuit Judge, Eric

L. Clay, Circuit Judge, Julia S. Gibbons, Circuit Judge. (mcp)

7/1/04 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant McCreary Cnty . Filed in the Supreme Court on 06021004 , Supreme Ct. case number: 03-1693 . [01-5935] (swh)

7/6/04 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Harlan County, KY and Tim Saylor . Filed in the Supreme Court on 06-21-04 , Supreme Ct. case number: 03-1698 . [01-5935] (swh)

10/20/04 U.S. Supreme Court letter filed granting petition for writ of certiorari [2983032-1] filed by McCreary Cnty [01-5935] Supreme Court No. 03-1693 . Filed in the Supreme Court on 10-12-04 . (swh)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY; LOUANNE WALKER; and DAVE HOWE,	)	
Plaintiffs,	)	
v	)	No. 99-507
MCREARY COUNTY, KENTUCKY; and JIMMIE GREENE, in his official capacity as McCreary County Judge Executive	)	
Defendants.	)	

AFFIDAVIT OF JUDGE JIMMIE GREEN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CONTEMPT OR, IN THE ALTERNATIVE, FOR SUPPLEMENTAL PRELIMINARY INJUNCTION

STATE OF KENTUCKY
COUNTY OF MCCREARY

Upon being duly sworn by the undersigned officer empowered to administer and attest to oaths, the Affiant, Judge Jimmie Green, testifies as follows:

1. I am a Defendant in the above-captioned action in my official capacity as McCreary County Judge Executive.

2. After this Court entered its Order of May 5, 2000, requiring the removal of a display containing the Ten Commandments, I obeyed this Court's Order and caused the display to be removed from the walls of the Courthouse.

3. Shortly thereafter, I allowed a modified display to be hung on a wall in the Courthouse. This modified display contained the full text of the Magna Carta, the full text of the Declaration of Independence, the full text of the Bill of Rights of the Constitution of the United States, a picture of Lady Justice together with an explanation of her significance, the full text of the national motto of the United States together with the preamble to the Kentucky Constitution, the full text of the Star Spangled Banner, the full text of the Ten Commandments, the full text of the Mayflower Compact, and an explanation of each of the documents' historical and legal

significance.

4. The document display is entitled, "The Foundations of American Law and Government Display." The purpose of the display is to display documents that played a significant role in the foundation of our system of law and government. The purpose of the display is educational in nature, and is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States.

5. It was and is my intention to comply with this Court's Order of May 5, 2000, when I took down the display that this Court had ordered to be taken down. It was and is my further intention, to comply with this Court's Order in allowing the modified display to be hung on the walls of the Courthouse. I strongly believe that the new display erected in October of this year, is not a "similar display" within the meaning of this Court's Order of May 5, 2000. I firmly believe that the new

display erected in October bears no relation to the modified display that this Court ordered to be taken down in May.

6. This purpose of the display is sincere, and the display is not intended to convey endorsement of any religion.

7. It was my intention, and has always been my intention, to fully comply with this Court's Order of May 5, 2000. I do not believe that I have violated this Court's Order of May 5 in any way, and I firmly believe that the new display erected in October is constitutional.

Further Affiant sayeth not. Under penalty of perjury, I declare that I have read the foregoing; that the facts alleged are true, to the best of my knowledge and belief.

/s Judge Jimmie W. Greene
JUDGE JIMMIE GREEN

STATE OF KENTUCKY
COUNTY OF MCCREARY

The foregoing instrument was acknowledged before me this 21st day of DECEMBER, 2000, by JIMMIE GREEN,

who is personally known to me or who has produced identification and who took an oath/affirmed.

Doris Ball
Notary Public
My Commission expires: 12-18-2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY; LAWRENCE DURHAM; and PAUL LEE,	)	
Plaintiffs,	)	
v	)	No. 99-509
PULASKI COUNTY, KENTUCKY; and DARRELL BESHEARS, in his official capacity as Pulaski County Judge Executive	)	
Defendants.	)	

AFFIDAVIT OF JUDGE DARRELL BESHEARS IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CONTEMPT OR, IN THE ALTERNATIVE, FOR SUPPLEMENTAL PRELIMINARY INJUNCTION

STATE OF KENTUCKY
COUNTY OF PULASKI

Upon being duly sworn by the undersigned officer empowered to administer and attest to oaths, the Affiant, Judge Darrell Beshears, testifies as follows:

1. I am a Defendant in the above-captioned action in my official capacity as Pulaski County Judge Executive.

2. After this Court entered its Order of May 5, 2000, requiring the removal of a display containing the Ten Commandments, I obeyed this Court's Order and caused the display to be removed from the walls of the Courthouse.

3. Shortly thereafter, I allowed a modified display to be hung on a wall in the Courthouse. This modified display contained the full text of the Magna Carta, the full text of the Declaration of Independence, the full text of the Bill of Rights of the Constitution of the United States, a picture of Lady Justice together with an explanation of her significance, the full text of the national motto of the United States together with the preamble to the Kentucky Constitution, the full text of the Star Spangled Banner, the full text of the Ten Commandments, the full text of the Mayflower Compact, and an explanation of each of the documents' historical and legal

significance.

4. The document display is entitled, "The Foundations of American Law and Government Display." The purpose of the display is to display documents that played a significant role in the foundation of our system of law and government. The purpose of the display is educational in nature, and is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States.

5. It was and is my intention to comply with this Court's Order of May 5, 2000, when I took down the display that this Court had ordered to be taken down. It was and is my further intention, to comply with this Court's Order in allowing the modified display to be hung on the walls of the Courthouse. I strongly believe that the new display erected in October of this year, is not a "similar display" within the meaning of this Court's Order of May 5, 2000. I firmly believe that the new

display erected in October bears no relation to the modified display that this Court ordered to be taken down in May.

6. This purpose of the display is sincere, and the display is not intended to convey endorsement of any religion.

7. It was my intention, and has always been my intention, to fully comply with this Court's Order of May 5, 2000. I do not believe that I have violated this Court's Order of May 5 in any way, and I firmly believe that the new display erected in October is constitutional.

Further Affiant sayeth not. Under penalty of perjury, I declare that I have read the foregoing; that the facts alleged are true, to the best of my knowledge and belief.

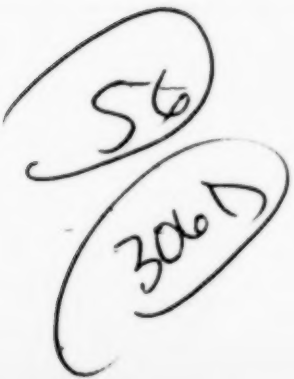
Darrell BeShears
JUDGE DARRELL BESHEARS

STATE OF KENTUCKY
COUNTY OF PULASKI

The foregoing instrument was acknowledged before me this 21st day of DECEMBER, 2000, by DARRELL BESHEARS, who is personally known to me or who has

produced identification and who took an oath/affirmed.

Beverly L. Harget
Notary Public
My Commission expires: 2-25-2001



Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

16

No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

Mathew D. Staver
(Counsel of Record)
Erik W. Stanley
Anita L. Staver
Rena M. Lindevaldsen
Bruce W. Green
Mary E. McAlister
Lindsey F. Martin
Johnnie L. Turner

LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, FL 32750
(407) 875-2100
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal-size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

PARTIES

The Petitioners consist of McCreary County, Kentucky, and Jimmie Greene as County Judge Executive of McCreary County, and Pulaski County, Kentucky, and Darrell BeShears, as County Judge Executive of Pulaski County. Although Jimmie Greene and Darrell BeShears are referred to as "Judge Executive," they are neither lawyers nor judges. The title "Judge Executive" is given to the chief elected administrative official for each county. The Petitioners will be individually referred to as "McCreary" or "Pulaski" or collectively as "courthouses" or "Petitioners."

The Respondents include the American Civil Liberties Union of Kentucky, Louanne Walker and Dave Howe as residents of McCreary County, and Lawrence Durham and Paul Lee as citizens of Pulaski County. The Respondents will be referred to collectively as "Respondents" or "ACLU."

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JURISDICTION

The judgment of the Court of Appeals was rendered on December 18, 2003. Rehearing *en banc* was denied on March 23, 2004. A Petition for Writ of Certiorari was filed on June 21, 2004, which this Court granted on October 12, 2004. Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Establishment Clause of the First Amendment to the United States Constitution which states, in part, "Congress shall make no law respecting an establishment of religion...."

STATEMENT OF THE CASE

On November 18, 1999, three separate complaints were filed against McCreary and Pulaski Counties and the Harlan

County School District.[1] The complaints challenged displays in the McCreary and Pulaski courthouses consisting of a privately donated, framed copy of the Ten Commandments. PA 6a. Before any hearing, Petitioners posted additional donated documents. PA 7a . This display consisted of the Ten Commandments along with other historical documents. PA 7a. Most of the documents were included in their entirety, but the Declaration of Independence and message from President Lincoln were excerpted. *Id.* The District Court ordered their removal and directed that no similar displays be erected. PA 8a, 137a-138a, 161a-162a.

Petitioners filed a motion to clarify the orders to determine whether any of the documents could ever be re-posted. PA 4a. The court denied the motion, stating that "the injunction speaks for itself." *Id.*[2] Assuming the displays could be modified, Petitioners changed them. ("Foundations Display," "Display" or "Displays"). The Foundations Display contained the entire text of nine documents and a document entitled "The Foundations of American Law and Government." ("Foundations Document"). The documents are in eleven equal-size frames.[3] The Foundations Document

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[1]Harlan's Petition is being held and is not before this Court.

[2]The court later stated that the order barring "no similar displays" was unclear. *See* "Appendix" entry in Joint Appendix 46, at 220. ("JA").

[3]The Display includes: (1) The Declaration of Independence; (2) The Star-Spangled Banner; (3) The Mayflower Compact; (4) The Bill of Rights; (5) The Magna Carta (contained in two equal frames due to its length); (6) The National Motto in the seal of the United States; (7) The Preamble to the Kentucky Constitution; (8) The Ten Commandments; (9) A picture of Lady Justice; and (10) The Foundations Document frame explaining each of the documents in the Display. PA 177a-212a. The

states, in part, that the "display contains documents that played a significant role in the foundation of our system of law and government." PA 10a, 60a, 206a. Both Judge Executives testified that the Display "is educational in nature, and is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States." JA 57, 62. In part, the Foundations Document states that the Mayflower Compact was the "first written constitution in the New World." PA 179a. The Declaration of Independence is "[p]erhaps the single most important document in American history," standing for the proposition of unalienable rights. PA 180a. The Magna Carta brought King John and England's "future rulers within the rule of law." PA, 181a. The Bill of Rights is said to be a "powerful force in American Government, shaping our laws and serving as a check on the exercise of government power." PA 183a. The Star-Spangled Banner "became a rallying cry for the American Patriots during the Revolutionary War." PA 182a. The Preamble to the Kentucky Constitution stands for the proposition that government is not a "giver of rights" and its power derives from the "consent of the people." PA 183a. "Lady Justice is a symbol of the American system of justice and the ideals it embodies." *Id.* The Ten Commandments "influenced the formation of Western legal thought and the formation of our country." PA 180a.

None of the documents are set apart or have any greater prominence than any other document. PA 60a, 177a, 178a.

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posted Ten Commandments document does not make any reference the Scriptural text or translation version. *See* "Notice of Filing Regarding Historical Displays." JA 15 #56.

All the frames are of equal size. The Ten Commandments is only one of eleven frames. *Id.* Each courthouse contains numerous other historical documents *in addition* to the Foundations Display. In McCreary, there are 58 historical documents posted in the Executive's office, 41 in the waiting room, 124 in the side entrance to the courthouse, 33 in the fiscal courtroom, and 28 in the conference room. As part of the 200th anniversary in 1999, Pulaski added numerous historical documents in the Executive's office, in the lobby, in the side entrance to the courthouse, in the fiscal courtroom, and in the conference room. JA 1 #5 at 6; 28 #6 at 6-7. The Foundations Display is in the lobby hallway of both courthouses, not in the courtroom or any other official place of business. *Id.*

The District Court enjoined the Foundations Display and ordered that the Ten Commandments be removed. PA 113a-114a. A divided panel of the Sixth Circuit affirmed. PA 1a-95a. Two judges found the Foundations Display violated the purpose prong of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). PA 16a-42a. The judge who wrote the opinion commented on the effects prong, but no one joined him. PA 51a. Judge Ryan would have upheld the display under the purpose and effects prongs. PA 52a-95a. The majority held that the content of the Display did nothing to detract from the "religious" nature of the Ten Commandments because the Display did not demonstrate an "analytical or historical connection with the other documents." PA 27a-34a. The court held the context of the Display was "religious" because the Ten Commandments is "blatantly religious" and is an "active," not a "passive symbol" of religion. PA 35a. The court also held that the prior displays created an "unconstitutional taint." PA 41a-42a.

The Sixth Circuit denied rehearing *en banc*, with the judge who wrote the majority opinion concurring and two judges dissenting, in which they pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. PA 163a-176a. The dissent wrote that no court has ever required an "analytical or historical connection" and that the history of the Display is entitled to "considerably less weight than the majority gives it." PA 172a-175a. The dissent rejected the novel "theory of indelible, unconstitutional 'taint,'" noting that, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." PA 83a-84a.

SUMMARY OF THE ARGUMENT

The Foundations Display passes every test developed by this Court. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the secular purpose is to educate the public about some of the "documents that played a significant role in the foundations of our system of law and government." The mere presence of the Ten Commandments does not transform the otherwise secular Display into a religious one. The Sixth Circuit erroneously demanded some "demonstrated analytical or historical connection" with the other documents. That the Display is about law and that the Decalogue is law and has influenced American law should be sufficient. The Display is not meant to debate American history, nor is its purpose to present a treatise on law. Petitioners' purpose is to educate about law, and that purpose is secular, not religious.

Although the Sixth Circuit agreed that the Foundations Display does not emphasize the Ten Commandments, it faulted the placement of them with legal documents. The

court below erred by finding the Commandments to be an "active symbol of religion" that converts a secular display into a religious one. The majority also erred by holding that the prior displays tainted the Foundations Display. If the prior displays were devoid of a secular purpose, which Petitioners deny, the Foundations Display clearly is not. If government missteps on an Establishment land mine, it should be allowed to correct itself. The Foundations Display is most relevant to purpose. The Display is about law, not religion.

No reasonable observer would consider the Foundations Display an endorsement of religion. Such an observer, aware of the historical influence of the Ten Commandments, would view them in context with the other legal documents. Being only one of eleven documents in a display on law and viewed in light of history and ubiquity, no objective observer would conclude the Display favors or establishes religion.

The Display passes the test in *Marsh v Chambers*, 463 U.S. 783 (1983). Government use of and reliance upon the Ten Commandments runs from Colonial times to the present. They have influenced the development of American law. The drafters of the First Amendment would not have conceived that the Establishment Clause would require the removal of a passive display like the one before this Court.

The Display also passes the coercion test in *Lee v. Weisman*, 505 U.S. 577 (1992). Viewing a passive Display that includes the Decalogue is not an overt religious exercise. Onlookers are primarily adults who may avert their glance and freely pass. Passersby are not compelled to participate in a religious exercise, nor are they coerced to view the Display.

Although the Display passes the *Lemon* test, this Court should overrule or modify the test. At a minimum, the purpose prong should be abandoned. It focuses too much on subjective motives when the focus should be on the objective effects of an activity. This Court should adopt a new test for government acknowledgments of religion. Justice O'Connor's proposed test in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring), is a starting point. Each factor should be carefully considered to avert another *Lemon*. "History and ubiquity" are important factors to include. The "absence of worship or prayer" factor may be difficult to apply because dividing speech from worship is fraught with problems. The "nonsectarian consideration" is workable so long as context is considered, as in the creche and menorah cases. Caution must be exercised so that the "minimal religious content" factor does not lead to word counts. Perhaps the test should include some element of coercion, being understood as compulsion. At any rate, the Display passes every test, including all aspects of Justice O'Connor's proposed test. Whatever the test, it should respect our religious heritage by distinguishing between real establishments and permissible acknowledgments of religion.

ARGUMENT

I. THE FOUNDATIONS DISPLAY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. The Foundations Display Passes The *Lemon* Test.

Although *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused confusion, the Foundations Display satisfies the *Lemon* test. In *Lynch v. Donnelly*, 465 U.S. 668, 687-94

(1984)(O'Connor, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the *Lemon* test was refined into the "endorsement" test and narrowed to the purpose and effects prongs. The purpose test focuses on the subjective intent of the government speaker and the effects on the objective meaning of the statement to a reasonable observer. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). The purpose prong asks "whether government's actual purpose is to endorse or disapprove of religion," and the effects prong asks "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion. *Id.*[4]

1. The Display has a secular purpose.

A challenged activity will be invalidated only if it is "*entirely* motivated by a purpose to advance religion."[5] "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Lynch*,

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[4]The entanglement prong has been subsumed into the effects prong and is concerned with "institutional" entanglement. The "political divisiveness" inquiry only applied to school funding cases, but has been discarded by cases post *Aguilar v. Felton*, 473 U.S. 402 (1985). *See Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); *Mitchell v. Helms*, 530 U.S. 793, 825-26 (2000)(plurality).

[5]*Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)(emphasis added); *see also Bowen v. Kendrick*, 487 U.S. 589, 602 (1988)(same); *Lynch*, 465 U.S. at 680 (same). An activity will satisfy the purpose prong even if it is "motivated in part by a religious purpose." *Wallace*, 472 U.S. at 56. "A religious purpose alone is not enough to invalidate an [activity]." *Edwards v. Aguilard*, 482 U.S. 578, 599 (1987)(Powell, J., concurring).

465 U.S. at 681 n.6. Courts should be "deferential" to any "articulation of a secular purpose," especially where "a legislature expresses a plausible secular purpose," unless it is insincere or a "sham."[6] Petitioners' stated purpose to educate the public about some of the "documents that played a significant role in the foundation of our system of law and government" is a legitimate secular purpose and clearly not a sham. PA 18a, 179a. As Judge Ryan noted, a "sham" means a fraud, a hoax or an intentional deception. PA 74a. There is no such evidence in this record. The purpose as expressed in the Foundations Document and the testimony of both Judge Executives that the Display is "educational in nature" is undisputed. PA 179a; JA 57, 62. The Display is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States." JA 57, 62.

The court below veered astray when analyzing the content, setting, and past history. The court erroneously held that the Display lacked a "demonstrated analytical or historical connection" between the Ten Commandments and the other documents. PA 27, 29a. For content, the court focused on portions of two sentences in the Foundations Document. The majority contorted the text to say that "the Ten Commandments profoundly influenced the drafting of the Declaration of Independence," PA 29a, when it actually states that the Ten Commandments "influenced the formation of Western legal thought and the formation of our country." The influence of the Ten Commandments on Western legal

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[6]*Edwards*, 482 U.S. at 586-87; *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring). *See also Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (where there is a "plausible" secular purpose, it will be accepted).

thought is seen in the Declaration's statement about "unalienable rights" "endowed" by the "Creator." The text then states that the Ten Commandments provide the "moral background" of the Declaration and the "foundation of our law." PA 180a. The text nowhere claims that the Ten Commandments influenced Thomas Jefferson or the drafting of the Declaration. The discussion about whether Jefferson's views were heterodox is pointless.[7] However, that the Ten Commandments influenced American law and government can hardly be questioned.

Whether those who posted the Foundations Display were accurate regarding the role of the Ten Commandments in American law is irrelevant to their purpose. So long as the government is sincere in its purpose, it need not be accurate. Accuracy has never been a component of purpose. Courts are "obviously not required to determine whether the secular purpose is morally or politically correct - because the government acts neutrally so long as the purpose is one other than advancing religion." *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 784-85 (E.D. Ky. 2003). That two members of the Sixth Circuit disagree with the historical proposition that the Decalogue influenced American law is not determinative of Petitioners' purpose. Nor does purpose depend on the posting of a historical treatise near the Display. Whether two jurists are unable to perceive a "demonstrated analytical connection" between the Decalogue and law is beside the point. Petitioners' purpose is not to debate historians but to

[7]Commands regarding murder, property, theft, coveting, marriage, rest from labor and honoring parents are compatible with the rights to life, liberty and happiness. This does not mean that the Declaration relied on the Decalogue, nor does the Display make such a claim.

post a Display about law. Regardless of whether someone disagrees with it, Petitioners' purpose is sincere and legitimate. The purpose is not fabricated. Many historical and legal scholars agree that the Decalogue influenced American law. The fact that some may differ does not transform Petitioners' secular purpose into a religious one. The Display is about law, not religion. The Ten Commandments are law and have influenced American law. The purpose of the Display is to educate about some of the documents that influenced law and government. That purpose is secular. The Decalogue is at home with other legal documents. Its presence does not transform a secular Display into a religious one.[8]

[8]*See City of Elkhart v. Books*, 121 S. Ct. 2209, 2211-12 (2001) (Rehnquist, C.J., dissenting from denial of certiorari)("substantial contribution to secular legal codes" and played a "role in the development of our legal system"); *County of Allegheny*, 492 U.S. at 562 (Stevens, J., concurring in part, dissenting in part)(Moses holding the Ten Commandments with other lawgivers); *Edwards*, 482 U.S. at 593-94 (Decalogue played a secular role in Western civilization); *Lynch*, 465 U.S. at 677-78 (1984)(describing Moses with the Decalogue in this Court, noting "our history is pervaded by expressions of religious beliefs"); *Stone v. Graham*, 449 U.S. 39, 45 (1980)(Rehnquist, J., dissenting)(the Decalogue has "had a significant impact on the development of secular legal codes of the Western World"); *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965)(Stewart, J., dissenting)(most criminal laws coincide with the Decalogue); *McGowan v. Maryland*, 366 U.S. 420, 462 (1961)(Frankfurter, J., concurring)("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004)(influenced "ethics and a just society"); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973)("historically important ... with both secular and sectarian effects"); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1958 (2001)("played a role in the secular development of our society"); *Mercer County*, 219 F. Supp. 2d at 784 (influenced "our

Regarding context, the opinion admits "the displays did not provide undue physical emphasis on the Ten Commandments," but the Display was faulted for "sandwiching" the Commandments, which the court called an "active symbol of religion," in with the other documents. PA 35a. How the Decalogue can be an "active" symbol of religion when a creche is not is baffling.[9] The Ten Commandments no more convert the other documents into a religious display than the creche makes Santa Claus a disciple of Christ. As Justice Stevens noted, placing Moses and the Ten Commandments as the "only adornment on a courtroom wall" conveys an "equivocal message," with other select *religious* leaders an impermissible message, and with other *lawgivers* a "respect not for great proselytizers but for great lawgivers." *County of Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part, dissenting in part).

The opinion in *Stone* did not hold that the displays of the Ten Commandments are always religious but that the "purpose for posting" them in a classroom in that case was religious. 449 U.S. at 41. If the Decalogue were solely religious, its mere presence alongside secular legal documents

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common law" and a "court of law may not change history.").

[9]The creche is "the chief symbol" of the "Christian belief" in "a divine Savior," *Lynch*, 465 U.S. at 708 (Brennan, J., dissenting), yet this Court called the "creche, like a painting," a "passive" symbol. *Lynch*, 465 U.S. at 685. Religious symbols are "passive." *County of Allegheny*, 492 U.S. at 662-63, 664 (Kennedy, J., concurring in part, dissenting in part). Religious tax exemptions, which require some "state involvement with religion," are likewise "passive." *Walz v. Tax Comm'n*, 397 U.S. 664, 691 (1970). A Ten Commandments display or monument is also "passive." *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting).

does not equate to a religious purpose for the Display. The creche in *Lynch* was religious, but the purpose of the display was secular. *See* 465 U.S. at 668. Although the Ten Commandments have a religious origin, they may be "integrated into the school curriculum," taught to youngsters in a captive setting, *Id.* at 42, and have "a secular application."[10]

The majority used the prior displays to "taint" the Foundations Display. Yet, the argument that an alleged religious purpose always taints a subsequent purpose that is substantially secular must fail. The Foundations Display is unlike any prior display. The Foundations Display clearly is not devoid of a secular purpose. Even if Petitioners were deemed to have begun with a wholly religious purpose, they did not end with one. The Foundations Display itself is more relevant to purpose than shadows of the past, and it clearly reflects a secular purpose.

If the opinions of this Court give jurists "blurred" vision to "dimly" perceive permissible Establishment Clause lines, then they certainly will affect elected officials' vision of constitutionality, entitling them to some grace in trying to negotiate the territory.[11] In the constitutional minefield established by *Lemon*, where the line bends and curves, ebbs and flows, generating numerous pluralities, surely courts must

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[10]*Books*, 121 S. Ct. at 2211 (Rehnquist, C.J., dissenting from denial of certiorari). *See School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1962)(the Bible may be taught in school when "presented objectively as part of a secular program of education").

[11]*See, e.g., Mitchell*, 530 U.S. at 807; *Lynch*, 465 U.S. at 679; *Lemon*, 403 U.S. at 612.

allow government officials to correct their conduct. One misstep cannot forever haunt the future. The Third, Sixth, and Seventh Circuits have permitted government officials to modify the purposes for a Good Friday holiday, a display that began with only a creche, and displays of the Ten Commandments.[12] Even if some officials began with religious motives, evidence of which is absent from this record, the focus must center on the purpose of the *current* Display. Motives do not equal purpose. Sunday laws "were motivated by religious forces," *McGowan*, 366 U.S. at 431, and "unquestionably religious in purpose," *Id.* at 466-69, 487 (Frankfurter, J., concurring), yet were upheld because over time they accumulated secular purposes. Officials originally "decreed a Sunday day of rest for the impermissible purpose of supporting religion," but the laws were upheld because government "abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends." *Walz*, 397 U.S. at 688 n.8 (Brennan, J., concurring). *See also Schempp*, 374 U.S. at 263-64.[13]

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[12] *See Adland v. Russ*, 307 F.3d 471, 489-90 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003)(Ten Commandments); *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999)(Good Friday); *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999)(Creche); *Books*, 235 F.3d at 307-08 (Ten Commandments); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995)(Good Friday). *See also Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003)(the current purpose of a Ten Commandments display is more relevant than the original purpose).

[13] *See Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990)("motives of legislators" are irrelevant); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2325 (2004)(O'Connor, J., concurring)(motives for adding "under God" in Pledge cannot, on their own, determine purpose); *Wallace v. Jaffree*, 472 U.S. 38, 77 (1985)(O'Connor, J., concurring)("little, if any, weight" should be given to intent of legislators);

The Sixth Circuit's reliance on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), is misplaced. *Santa Fe* does not stand for the proposition that the past taints future actions. In that case, all four policies provided students with only one choice. *Id.* at 296-98. The fourth policy remained a "prayer only" policy. *Id.* at 298, 306, 315. The person designated to speak was the *same* student voted on under the prior "prayer only" policy. *Id.* at 298 n.5, 309. The school district "viewed the [fourth] policy simply as a continuation of the previous policies ... as illustrated by the fact that the school did not conduct a new election...." *Id.* at 309. The fourth policy *on its face* failed the purpose prong because "*the text ... alone* reveals that it has an unconstitutional purpose." *Id.* at 315 (emphasis added); *see also id.* at 307 n.21, 314..

In contrast to *Santa Fe*, the District Court acknowledged that the Foundations Display "differs ... fundamentally from the other one." JA 46 at 220. Anyone acquainted with the modification of the displays must agree. The Foundations Document explains that the Display "contains documents that played a significant role in the foundation of our system of law and government." PA 179a. This statement, combined with the eleven equal-size frames (not to mention scores of other historical pictures and displays on the courthouse walls), emphasizes the secular purpose of the *entire* Display.

Although this case illustrates why the purpose prong should be abandoned, the Foundations Display passes the test.

McGowan, 366 U.S. at 466-67, 469 (Frankfurter, J., concurring)(courts cannot "psychoanalyze legislators").

The Display presents the permissible secular purpose of educating the public about some of the documents that influenced American law and government. Nothing in the Display, nor its past history, evinces a religious purpose, let alone a *wholly* religious purpose. The contrary holding under the purpose prong should be reversed.

2. The display does not endorse religion.

The Sixth Circuit decided the case under the purpose prong, but Judge Clay ventured alone into the effects prong.[14] This brief will therefore address whether a reasonable observer would view the Foundations Display as conveying a message of endorsement or approval of religion. The reasonable observer is "fully aware of our national history," is "more informed than the casual passerby," does not allow personal feelings to cloud judgment, is aware of "general history," including the scores of other historical and legal pictures and documents on display in the courthouses, has some knowledge of constitutional law, and understands "the government can acknowledge the role of religion in our society in numerous ways that do not amount to endorsement."[15]

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[14]Judge Gibbons joined Judge Clay on the purpose prong, but expressed "no opinion" on the effects prong. PA 51a. Judge Ryan dissented and would have upheld the Display under both prongs. PA 52a -95a.

[15]*Newdow*, 124 S. Ct. at 2322-23 (O'Connor, J., concurring); *Capitol Sq. Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-81 (1995)(O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring)(emphasis omitted);*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 348-49 (1987) (O'Connor, J., concurring)(must be aware of accommodation under the Free Exercise Clause); *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring)(same).

Under the endorsement test, the "'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates" the challenged action. *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). Both the creche and the menorah in *County of Allegheny* were sectarian, but the creche without secular symbols was deemed sectarian while the menorah with secular symbols was not. "'Although the religious and indeed sectarian significance' of the menorah 'is not neutralized by the setting,' this particular physical setting 'changes what viewers may fairly understand to be the purpose of the display - as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.'" *Id.* at 635 (quoting *Lynch*, 465 U.S. at 692)(O'Connor, J., concurring)). The same was true of the Pawtucket creche, the "chief symbol" of the "Christian religion," when accompanied by secular symbols, because the display, rather than endorsing religion in general, or Christianity in particular, celebrated a public holiday. This was true despite the fact that the creche is an exclusive symbol of Christianity, its sectarian significance was "not neutralized" by the display, it was a significant part of the display, the display was "celebratory not instructional," "the city did nothing to counteract any possible religious message," and the "government was understood to place its imprimatur on the religious content of the creche." *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring). These facts did not add up to a religious purpose. "[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. ... [The question] in large

part [is] a legal question to be answered on the basis of judicial interpretation of social facts." *Id.* at 693-94.

The Sixth Circuit erred by finding a religious purpose, and one judge a religious effect. The focus must not zoom in on the Ten Commandments in isolation from history and context. If the focus centered on the "religious component of any activity," then our religious heritage would be erased. *Lynch*, 465 U.S. at 680. "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part). In *Lynch*, the creche was the *predominant* part of the display. There the creche captured the viewer's attention, but a panoramic scan also took in the surrounding secular symbols. Like the error committed by the lower court in *Lynch*, Judge Clay focused "almost exclusively" on the Ten Commandments. *See Lynch*, 465 U.S. at 680. When viewed as a whole, the Ten Commandments is on a wall, accompanied by ten other identical frames, in the midst of thousands of words with the secular explanation in the Foundations Document, and in a courthouse with scores of other historical and legal pictures and displays. The theme is stated in the Foundations Document as a depiction of some documents that influenced American law and government. The reasonable observer would be aware of numerous legal and historical displays in the courthouses *in addition* to the Foundations Display: 284 displays in McCreary and scores of displays in Pulaski, the number of which grew in 1999 to

commemorate the County's 200th anniversary.[16]

Placing a microscope on any one document, or portion thereof, is an obvious mistake. Parsing the Magna Carta reveals it discriminates against Jews in lending money and considers women of less value than men; the Declaration of Independence quarrels with standing armies, an accepted modern reality. Hammurabi adorns the walls of this Court, but that does not translate into support of the death penalty for thieves, which his Code condones.[17] In the same way the Foundations Display does not promote discrimination or advocate disarmament, it does not endorse religion.[18]

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[16] *See* Pulaski County History, *available at* <http://www.pulaskicountygovt.org/history.htm> (discussing some history of the courthouse)(last visited December 2, 2004).

[17] *See* (PA 202a ¶¶ 10-11, 208a ¶ 54); James Pritchard, 1The Ancient Near East 139 ¶ 6, 141 ¶ 22 (1958). This Code allegedly was given to Hammurabi by the sun-god, Shamash.

[18] The different versions argument misses the point. The text is virtually the same in substance, no matter the version. The minor differences are constitutionally insignificant because the focus is not on the Decalogue as a *theological* document but on the *entire* Display. The reasonable observer is not a professor in Hebraic studies. A creche is sectarian. It is not generic. It divides society into two halves – Christian and non-Christian. Yet, when the focus is on the *overall* display as in *Lynch*, it is the display as a *whole*, not the religious symbol in *particular*, that the viewer perceives. It is irrelevant that a Nativity scene is sectarian or displayed on December 25 rather than January 6, the day the birth of Christ is celebrated by some Christians, because the religious symbol alone does not determine endorsement; history and context do. This Court rejected an argument based on *Larson v. Valente*, 456 U.S. 228 (1982), that a religious symbol, like a creche, which "is identified with one religious faith," discriminates among sects. *See Lynch*, 465 U.S. at 685, 687 n.13.

Unlike the creche, which is solely sectarian, the Ten Commandments has both religious and secular aspects. On its face, the commands about honoring parents, murder, adultery, theft, bearing false witness and coveting are secular and universal. The Sabbath command partakes of both secular and religious aspects - worship and resting from labor.[19] Only a few commands refer to God. Thus, on its face, the Ten Commandments frame contains more secular than religious language. Like the other secular documents in the Display, the Ten Commandments is presented in its entirety except for a few words. Had Petitioners excerpted only the secular portion of the Decalogue, that action would evince hostility rather than neutrality toward religion. *See Zelman*, 536 U.S. at 669 (O'Connor, J., concurring)(the state must be neutral, not an "adversary"); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 114 (2001)(discussing neutrality). It is the Ten Commandments, not the "several commandments," that influenced American law.[20]

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[19]This Court upheld Sunday labor laws despite their religious origin, the religious motivation for the laws, and the continued use of (1) "Lord's day," (2) "Sabbath," (3) provisions prohibiting "profanation," restricting labor near churches, and exempting some activities only in the afternoon after worship service times, because, in the context of history, these laws also had developed secular reasons for their existence. *See McGowan*, 366 U.S. at 445; *see also id.* at 462-504 (Frankfurter, J., concurring).

[20]Senior Judge Noonan of the Ninth Circuit wrote that the Ten Commandments "have been the most influential law code in history." John T. Noonan, Jr., The Believer and the Powers that Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government 4 (1987); *see also* John Witte, Jr. and Harold J. Berman, The Transformation of Western Legal Philosophy in Lutheran Germany, 62 S. Cal. L. Rev. 1573-1660 (1989)(detailing how the Ten Commandments were used in the formation of the modern state); Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 65 (1983).

The Foundations Display does not focus on the Ten Commandments. It is a display consisting of some documents that influenced American law and government, of which the Decalogue constitutes only one frame. A reasonable observer does not suffer from tunnel vision. Such an observer takes in the entire Display, reads that the Display is about law - not religion, is aware of the numerous other documents in the courthouse, and has some basic understanding of history and our religious heritage. A reasonable observer could not possibly conclude that the Foundations Display as a whole endorses religion.

Unlike Christmas, which did not emerge as a widespread celebration until "well into the nineteenth century" and did not become a national holiday until 1870, *Lynch*, 465 U.S. at 720-23 (Brennan, J., dissenting), the secular use and influence of the Ten Commandments was brought to America by her first explorers. From Colonial times to the present, their influence has permeated our American way of life.

Throughout history, courts and legislatures have referred to the Decalogue and its impact on our laws. This Court has recognized the influence the Ten Commandments has had on our system of law and government.[21] This Court's chambers are "decorated with a notable and permanent - not seasonal - symbol of religion: Moses with Ten Commandments." *Lynch*, 465 U.S. at 677. The Ten Commandments have been

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[21]*See Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting)("the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."). *See also* footnote 8.

repeatedly used by government from the inception of America. Their use in the present context is no more offensive to the Constitution than the creche in *Lynch*, the menorah in *County of Allegheny*, legislative prayers in *Marsh*, or a host of other ceremonial and public acknowledgments of religion.[22]

As noted above, the Ten Commandments must be viewed in its entirety and as part of the larger Foundations Display. It must be viewed in context. But even if a court were erroneously to focus on the Decalogue, contrary to the clear teaching of this Court in *Lynch* and elsewhere, there would be no endorsement. Each commandment played some significant role in the foundation of our system of law and government. Twelve of the thirteen original colonies adopted the entire Decalogue into their civil and criminal laws. Rhode Island adopted most, but not all, of the Ten Commandments.[23] Volumes of statutory and case law have been written on the subject. The following is a brief overview of their influence, most of which a reasonable observer would appreciate.

In 1610, Virginia adopted the commandment about having "no other gods" by requiring its leaders to give "allegiance" to God "from whom all power and authority is derived," and who is the "King of kings, the Commander of commanders,

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[22]*See, e.g., County of Allegheny*, 492 U.S. at 573; *Lynch*, 365 U.S. at 688; *Marsh v. Chambers*, 463 U.S. 783 (1983).

[23]*See generally* Joseph Story, 3 Commentaries on the Constitution of the United States, §1867 (1833)(stating each colony was influenced by Christianity); Colonial Origins of the American Constitution: A Documentary History (Donald S. Lutz, ed., 1998). ("Colonial Origins").

and Lord of hosts."[24] In 1641, Massachusetts adopted a law that banned the worship of "any other god but the Lord God...."[25] Whether these and other laws discussed herein would currently pass constitutional muster is irrelevant to the question whether the Foundations Display reflects the *history* of law in this nation. Almost every state constitution refers to God, and many states have mottos that refer to God, like the National Motto.[26] Ethical monotheism flows from this commandment and is interwoven in the fabric of the Western legal tradition by supporting the proposition that a unitary god created all people and elevated each one to moral dignity.[27]

In 1680, the New Hampshire colony enacted a law prohibiting "idolatry" or the "worship of any other god but the

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[24]*Articles, Laws, and Orders, Divine, Politic and Martial for the Colony of Virginia*, *reprinted in* Colonial Origins at 315-16.

[25]Massachusetts Body of Liberties (1641), *reprinted in* The Colonial Laws of Massachusetts at 33 (W. H. Whitmore, 1890).

[26]*See Newdow*, 124 S. Ct. at 2322 n.1 (O'Connor, J., concurring); *ACLU v. Capital Sq. Review and Advisory Bd.*, 243 F.3d 289, 296 n.6 (6th Cir. 2001)(en banc); *Rector v. Church of the Holy Trinity*, 143 U.S. 457, 468 (1892).

[27]Ruben Alvarado roots two great principles of liberty in the monotheism of Israel: the triumph of laws over men, and participation of the ruled in government. He asserts that the basis of all future progress toward free society is rooted in the Decalogue and Israel's monotheism. The Decalogue influenced "civil constitutions," and its monotheism "founds a civil society." *See* Alvarado, A Common Law: The Law of Nations and Western Civilization 17-18 (1999)(citing and quoting 19th Century German historian Leopold von Ranke, 1 Weltgeschichte 43 (1928)). Monotheism effectuates one supreme law conferring rights and responsibilities from a unitary authority higher than government.

Lord God."[28] The commandment regarding profaning God's name was adopted by Virginia in 1610 ("That no man blaspheme God's holy name") and by Connecticut in 1639 ("If any person shall blaspheme the name of God"), explained by the Maine Supreme Court in 1921, and traced by the Florida Supreme Court in 1944 back to the Decalogue.[29] This Court upheld the disposition of a will *only* after determining that the devise for a secular college did not profane Christianity.[30]

In upholding Sunday closing laws, this Court acknowledged their origin in the Decalogue. *See McGowan*, 366 U.S. at 437-45. In his exhaustive concurrence, Justice Frankfurter traced the origins of these laws from Mount Sinai to the present, citing several hundred statutes and court decisions. *Id.* at 462-504 (Frankfurter, J., concurring). The influence of the Decalogue is seen in the U.S. Constitution

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[28]*General Laws and Liberties of New Hampshire 1680, reprinted in* Colonial Origins at 6.

[29]*See* Colonial Origins at 316; The Code of 1650 at 28-29. *See State v. Mockus*, 113 A. 39, 42 (Me. 1921)(discussing profanation); *Cason v. Baskin*, 20 So.2d 243, 247 (Fla. 1944)(en banc)("These decisions doubtless hark back to the third Commandment of the decalogue: 'Thou shalt not take the name of the Lord thy God in vain.'").

[30]*See Vidal v. Executors of Girard*, 43 U.S. 127 (1844). In *People v. Ruggles*, 8 Johns 290 (N.Y. Sup. Ct. 1811), Chief Judge Kent upheld a conviction of profaning God, stating that "the morality of the country is deeply ingrafted upon christianity." *See also Updegraph v. Commonwealth*, 11 Serg. & Rawle, 394 (Penn. 1824)(upholding profanation conviction, stating laws regarding the "Lord's day," perjury, adultery and others were founded upon Christianity and that Christianity "is and always has been a part of the common law of Pennsylvania.").

which prohibits a law from taking effect on Sunday.[31] Although hundreds of court opinions could be cited, the declaration by the Pennsylvania Supreme Court sums up the discussion in reference to the Sabbath commandment: "This divine pronouncement became part of the Common Law inherited by the thirteen American colonies and by the sovereign States of the American union."[32] Sunday labor laws are inexplicable without the Decalogue.[33]

A 1642 Connecticut law cited to the Ten Commandments for the proposition that children should honor their parents.[34] The Louisiana Court of Appeals stated: "'Honor thy father

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[31]*McGowan*, 366 U.S. at 452 n.22 ("The Constitution itself provided for a Sunday exception in the calculation of the ten days for a presidential veto."). *See also Missouri v. Chicago B. & Q. R. Co.*, 143 S.W. 785, 803 (Mo. 1912) (referring to a similar clause, "The framers of the [Missouri] Constitution, then, recognized Sunday as a day to be observed.").

[32]*Bertera's Hopewell Foodland, Inc. v. Masters*, 236 A.2d 197, 200-01 (Pa. 1967). *See* Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 Albany L. Rev. 675 (2000).

[33]The Sabbath commandment illustrates why courts should not hyper-focus on particular words in isolation from the context and overall meaning. Read literally, this commandment has nothing to do with Sunday. The actual Sabbath is Saturday, the seventh day of the week - not Sunday, the first day. The Sabbath commandment was applied to Sunday by the Emperor Constantine when he adopted Christianity. *See McGowan*, 366 U.S. at 565 (Douglas, J., dissenting). Sunday for most Christians became equated with the Sabbath. The point is that a myopic focus on words, religious aspects of the Decalogue, or minor variations in the text or numbering of the commands misses the mark. The Foundations Display is about law, and the Decalogue is only one part of the Display.

[34]*See* The Code of 1650 at 29; *see also* Colonial Origins at 230.

and thy mother,' is as much a command of the municipal law as it is a part of the Decalogue...."[35] Citations to the commandment prohibiting the taking of human life would fill volumes. A Kentucky court stated that "all forms of governments following the promulgation of Moses at Mt. Sinai [have] required of each and every one of its citizens that 'Thou shalt not murder.'"[36] One court quoting another declared: "Virtually all criminal laws are in one way or another the progeny of Judeo-Christian ethics. We have no intention to overrule the Ten Commandments."[37]

In a typical Colonial law, Massachusetts in 1641 prohibited adultery as did Connecticut in 1642, Rhode Island in 1647, New Hampshire in 1680 and Pennsylvania in 1705.[38] A Texas court declared, "Thou shalt not commit adultery is our law as well as the law of the Bible," and the Washington Supreme Court stated that adultery "violates one of the Ten Commandments and the statutes of this State."[39]

References to the commandment prohibiting theft are too

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[35] *Ruiz v. Clancy*, 157 So. 737, 738 (La. Ct. App. 1934). *See also Pierce v. Yerkovich*, 363 N.Y.S.2d 403, 414 (N.Y. Fam. Ct. 1974); *Mileski v. Locker*, 178 N.Y.S.2d 911, 916 (N.Y. Sup. Ct. 1958); *Beaty v. McGoldrick*, 121 N.Y.S.2d 431, 432 (N.Y. Sup. Ct. 1953).

[36] *Young v. Kentucky*, 53 S.W. 963, 966 (Ky. 1932).

[37] *Wisconsin v. Schultz*, 582 N.W.2d 113, 117 (Wis. App. 1998)(quoting *Sumpter v. Indiana*, 306 N.E.2d 95, 101 (Ind. 1974)).

[38] Colonial Origins at 84.

[39] *See Hardin v. Texas*, 46 S.W. 803, 808 (Tex. Crim. App. 1898); *Schreifels v. Schreifels*, 287 P.2d 1001, 1005 (Wash. 1955).

numerous to trace. Not only have laws against theft been derived from this commandment, but also laws protecting the integrity of elections, and (according to some courts) the U.S. Constitution's Takings Clause.[40] The commandment about bearing "false witness" became the foundation of our judicial system. Connecticut enacted a perjury law in 1642, and similar laws declaring their basis in the Decalogue were enacted by Massachusetts in 1641, Rhode Island in 1647, and New Hampshire in 1680.[41] In 1924, the Oregon Supreme Court stated, "'Thou shalt not bear false witness' is a command of the Decalogue, and that forbidden act is denounced by the statute as a felony."[42]

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[40] *See Hollywood Motion Picture Equip. Co. v. Furer*, 105 P.2d 299, 301(Cal. 1940)(theft); *Pennsylvania Co. v. United States*, 214 F. 445, 455 (W.D. Pa. 1914) (Takings Clause); *Doll v. Bender*, 47 S.E. 293, 300 (W.Va. 1904)(Dent, J., concurring)(elections). *See also Succession of Onorato*, 51 So.2d 804, 810 (La. 1951)("In the Ten Commandments, the basic law of all Christian countries, is found the admonition 'Thou shalt not steal.' This prohibition against the taking of the property of another is a natural law."); *Missouri v. Gould*, 46 S.W.2d 886, 889-90 (Mo. 1932)("When the Supreme Law Giver delivered the Ten Commandments to Moses, on Mt. Sinai, He embraced all offenses, wherein one person unjustly enriches himself at the expense of his neighbor, under the one simple commandment, 'Thou shalt not steal.'"); *Addison v. Florida*, 116 So. 629 (Fla. 1928)(larceny); *De Rinzie v. Colorado*, 138 P. 1009, 1010 (Colo. 1913)(burglary and larceny); *Utah v. Donaldson*, 99 P. 447, 449 (Utah 1909)(larceny).

[41] *See* The Code of 1650 at 28-29; *see also* Colonial Origins at 7, 84, 88, 190-91, 230.

[42] *See Watts v. Gerking*, 228 P. 135, 141 (Or. 1924); *see also Hosford v. Mississippi*, 525 So.2d 789, 799 (Miss. 1998); *Anderson v. Maddox*, 65 So.2d 299, 301-02 (Fla. 1953)(Terrell, J., concurring specially)("'Thou shalt not steal' and 'thou shalt not bear false witness' are just as new as they were when Moses brought them down from the Mountain.").

John Adams stated, "If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free."[43] The commandment against coveting has been cited as the basis of civil laws against defamation, election fraud, white collar crime, and cattle rustling.[44]

One would have to rewrite history to conclude that the Ten Commandments played an insignificant role in American law. The imprint of the Decalogue on the development of Western law is undeniable, and on American law is indisputable. In 1950, the Florida Supreme Court declared:

> A people unschooled about the sovereignty of God, the Ten Commandments, and the ethics of Jesus, could never have evolved the Bill of Rights, the Declaration of Independence, and the Constitution. There is not one solitary fundamental principle of our democratic policy that did not stem directly from the basic moral concepts as embodied in the Decalogue.[45]

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[43] John Adams, 4 The Works of John Adams, Second President of the United States 9 (Francis Adams, ed. 1851).

[44] *See Weinstock, Lubin & Co. v. Marks*, 42 P. 142, 145 (Cal. 1895)(defamation); *Doll v. Bender*, 47 S.E. 293, 300-01 (W.Va. 1904)(Dent, J., concurring)(election fraud); *Chisman v. Moylan*, 105 So. 2d 186, 189 (Fla. App. 1958)(white collar crime); *Swift & Co. v. Peterson*, 233 P.2d 216, 231 (Or. 1951)(cattle rustling).

[45] *Florida v. City of Tampa*, 48 So. 2d 78, 79 (Fla. 1950); *see also Commissioners of Johnston County v. Lacy*, 93 S.E. 482, 487 (N.C. 1917)("Our laws are founded upon the Decalogue"). John Quincy Adams, the sixth president, stated, "The law given on Sinai was a civil and municipal as well as a moral and religious code." John Quincy Adams, Letters of John Quincy Adams, to His Son, on the Bible and Its Teachings 61 (James M. Alden, ed., 1850).

To see the original Constitution and Declaration of Independence, one must first view the Ten Commandments at the entrances to the National Archives. Moses occupies the central position facing the Speaker in the United States House Chamber. Moses and the Ten Commandments appear five times in this Court, and twice Moses and the Decalogue occupy center stage.[46]

Among the myriad of documents on the walls of the McCreary and Pulaski courthouses, the Ten Commandments consists of only one frame. Viewed in its entirety and with the understanding of history, a reasonable observer would not conclude that the Ten Commandments, as one small portion of the Foundations Display on law, is an establishment of religion. The Decalogue played a significant role in the foundation of American law and may be constitutionally displayed for that reason. Any other conclusion would require erasing our shared American heritage.

B. The Foundations Display Passes The *Marsh* Test.

The *Marsh* test is similar to the "history and ubiquity" analysis under the endorsement test. In *Marsh v Chambers*,

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[46] *See* Symbols of Law Information Sheet at 2, *available at* <http://www.supremecourtus.gov/about/symbolsoflaw.pdf> (last visited December 2, 2004)("Throughout the history of western art, tablets have been used to signify 'the Law.' This tradition is closely associated with Moses, the Hebrew lawgiver, who according to the Book of Exodus descended from Mount Sinai with two stone tablets inscribed with the Ten Commandments"). *See also Lynch*, 465 U.S. at 677.

463 U.S. 783 (1983), this Court upheld legislative prayers, never mentioning *Lemon*. After chronicling history back to the debates on the Constitution and Bill of Rights, this Court concluded that such prayers were permissible since the same statesmen, on the same day they agreed on the language of the First Amendment, authorized Congress to pay a chaplain to open each session with prayer. *Id.* at 786-91. Contemporaneous actions taken by those who framed the First Amendment are "weighty evidence" of its intent. *Id.* at 790 (citation omitted). The Court noted that adults are primarily involved in hearing such prayers and they are "'not readily susceptible to religious indoctrination' or peer pressure." *Id.* at 792 (citations omitted). The Court rejected the argument that the clergyman presiding over the Nebraska assembly was "of only one denomination," namely Presbyterian, and had been so for sixteen years. *Id.* at 793. Finding that compensating the chaplain with public funds did not alter the conclusion, the Court stressed that its job was to distinguish "real threat from mere shadow." *Id.* at 795 (citation omitted). The longstanding practice provided "abundant assurance that there is no real threat 'while this Court sits.'" *Id.* at 795 (citation omitted).

Like legislative prayers, government use of and reliance upon the Ten Commandments pre and postdates the First Amendment. James Madison, whose influence on the First Amendment is sometimes cited by this Court,[47] did not

[47]*See e.g., Lee v. Weisman*, 505 U.S. 577, 590 (1992); *Edwards*, 482 U.S. 578, 605 (1987)(Powell, J. and O'Connor, J., concurring); *Walz*, 397, U.S. at 675 n.3, 684; *Engel v. Vitale*, 370 U.S. 421; *Everson v. Board of Educ.*, 330 U.S. 1, 11-15 (1947); *but see Wallace*, 472 U.S. at 92-111 (Rehnquist, J., dissenting)(questioning Madison's influence since he thought the Bill of Rights to be unnecessary).

consider the Sabbath commandment to be an infringement on conscience or a step toward establishment. He and Jefferson chose to enforce it as a matter of civil law.[48] As with legislative prayers, the framers of the First Amendment had no intention to make government acknowledgments of the Ten Commandments unconstitutional.

Whereas the prayers were offered daily in the legislature in *Marsh*, the Foundations Display here is silently posted on a wall for the infrequent passerby to see. To do business that may affect one's life or livelihood, the legislator whose presence is required, and the citizen who may need to appear, must listen every day to a state-sponsored prayer. In contrast, both citizens and staff in the courthouses may breeze by the Foundations Display without a second thought, with no gavel to call attention to a religious exercise and with no voice to intrude on thoughts or conversation.

Like legislative prayers, the Display does "not urge citizens to engage in religious practices...." *County of Allegheny*, 492 U.S. at 603 n.52. The Display is more analogous to a museum than a church, expresses general appreciation for law rather than dogma, affects no one's political standing, and compels no one to confess belief or

[48]*McGowan*, 366 U.S. at 437-38. Following Madison's Memorial and Remonstrance Against Religious Assessments, Virginia's Declaration of Rights, and the passage of a bill to repeal all laws establishing religion in the Commonwealth, the Sunday law legislation, based on the Sabbath commandment, remained in effect and was reenacted. Both Jefferson and Madison supported "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers" which passed in 1786. "Apparently neither Thomas Jefferson nor James Madison regarded it as repugnant to religious freedom." *Id.* at 494-95 (Frankfurter, J., concurring).

disbelief. "*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings." *Id.* at 670 (Kennedy, J., concurring in part, dissenting in part). History is a great tutor and it teaches us that enacting laws which coincide with the Ten Commandments or displaying passive symbols of the Decalogue, especially in the context of law as in this case, has neither established nor tended to establish religion.

C. The Foundations Display Passes The *Lee* Test.

The majority in *Lee v. Weisman*, 505 U.S. 577 (1992), found it unnecessary to "revisit difficult questions dividing" the Court which *Lemon* had generated. *Id.* at 586. *Lee* found unconstitutional coercion in the context of school-sponsored, state-controlled prayer in primary and secondary schools. Noting that "government may not coerce anyone to support or participate in religion or its exercise" or to act in a way that establishes a state religion, or tends to do so, the Court found that public school officials compelled young students to participate in "an overt religious exercise." *Id.* at 587-88. School officials placed prayer on the agenda, selected the clergy, directed him to follow guidelines on how to pray, and created an environment where students felt coerced to attend. The holding in *Marsh* was distinguished because of the "differences" between public schools and legislative sessions. The former involves youth compelled to attend one of the most important life events; the latter concerns adults who are

free to come and go. *Lee*, 505 U.S. at 597.[49]

Justices of this Court have indicated at various times that coercion is part of the Free Exercise Clause but not the Establishment Clause, have discussed coercion as though it is part of the Establishment Clause, or have stated that coercion alone is insufficient.[50] Under any version of the coercion test,

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[49]The majority of this Court does not appear to have adopted an indirect "coercion only" test. Justice Blackmun, joined by Justices Stevens and O'Connor, concurred on the basis of *Lemon*, noting that proof of coercion is unnecessary. *Id.* at 604. Justice Souter, joined by Justices Stevens and O'Connor, concurred, noting the force of some coercion arguments but expressing hesitance in a coercion-only test. *Id.* at 618. Justice Scalia, joined by Chief Justice Rehnquist, and Justices White and Thomas, dissented, noting that the "coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 640. The dissenters saw no warrant for expanding coercion beyond "acts backed by threat of penalty." *Id.* at 642.

[50]Not part of Establishment Clause: *Lee*, 505 U.S. at 604 (Blackmun, J., concurring); *Id.* at 619 (Souter, J., concurring); *County of Allegheny*, 492 U.S. at 597 n.47; *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963)(apparently rejecting coercion but then discussing "indirect coercion"); *Engel*, 370 U.S. at 431 (same); Discussing coercion: *Newdow*, 124 S. Ct. at 2320 n.4 (Rehnquist, C.J., concurring) (distinguishing between compulsion in *Barnette* and coercion in *Lee*); *Id.* at 2327 (O'Connor, J., concurring); *Id.* at 2328-31 (Thomas, J., concurring); *Good News*, 533 U.S. at 121 (Scalia, J., concurring); *Mitchell*, 530 U.S. at 870-71 (Souter, J., dissenting); *Santa Fe*, 530 U.S. at 587; *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 719 (1994)(O'Connor, J., concurring in part); *Mergens*, 496 U.S. at 261 (Kennedy, J., concurring in part); *County of Allegheny*, 492 U.S. at 657-63 (Kennedy, J., concurring in part, dissenting in part); *Wallace*, 472 U.S. at 60 n.51; *Zorach v. Clauson*, 343 U.S. 306, 311-14 (1952); *Id.* at 321 (Frankfurter, J., dissenting); Coercion insufficient by itself: *County of Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring

force or threat of penalty, indirect or psychological, the Foundations Display passes the test. *Lee* involved an "overt religious exercise," which a passive Display is not.[51] Unlike *Lee*, the onlookers here are primarily adults, able to avert their glance and free to pass. They are not compelled to attend, nor are they compelled to view the Display. If they happen to see it, they likely have had the experience of touring a public museum where they see some things they like and some they dislike. If unimpressed by one Display, they pass on to the many other pictures and displays. They need not modify their behavior. They are not taxed, penalized, or made to feel like outsiders. Their standing in the community is unaffected, and there is no hint that the Display has any tendency to establish religion. The Establishment Clause should not be used to brush aside shadows. The Foundations Display passes every test created by this Court.

II. THE *LEMON* TEST SHOULD BE OVERRULED OR MODIFIED, AT LEAST FOR GOVERNMENTAL ACKNOWLEDGMENTS OF RELIGION.

That the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has caused "hopeless confusion" is no surprise, as many members of this Court have voiced opposition to its continued use.[52] *Lemon* is not

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in part).

[51] *Lee*, 505 U.S. at 587-88; *Newdow*, 124 S. Ct. at 2320 n.4 (Rehnquist, C.J., concurring).

[52] *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)("checkered history"); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000)(Scalia, J., dissenting from denial of certiorari)(would grant certiorari to "inter the *Lemon* test"); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994)(Scalia, J., dissenting)("meaningless"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring)("stalks our Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985)(O'Connor, J., concurring)("should be reexamined and refined"); *Id.* at 91 (White, J., dissenting); *Id.* at 110-11 (Rehnquist, J., dissenting)(*Lemon* has spawned "unworkable plurality opinions," "consistent unpredictability" and "unprincipled results"); *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (Stevens, J., dissenting)(requires "sisyphean task" to apply the test).

solely to blame for the infamous three-part test because it merely stated what this Court had previously done.[53] Nevertheless, the chaos caused by *Lemon* led Justice Kennedy to state: "Substantial revision of our Establishment Clause doctrine may be in order...." *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989)(Kennedy, J., concurring in part, dissenting in part).

This Court acknowledged that there is no "rigid caliper" or "single test" and that *Lemon* was only meant as a "guideline."[54] Yet, the "guideline" continues to overshadow Establishment Clause jurisprudence. The *Lemon* test should

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[53] The purpose and effects of a government activity were first mentioned in *McGowan v. Maryland*, 366 U.S. 420, 443, 445 (1961), *Schempp*, 374 U.S. at 222, and *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968). The entanglement prong was first announced in *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

[54] *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting); *Santa Fe*, 530 U.S. at 319 (Rehnquist, C.J., dissenting); *Wallace*, 472 U.S. at 86 (Burger, C.J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

be abandoned. It has fractured this Court and caused scholars and litigators to wonder if there is any hope for consistency. There are as many conflicting decisions on virtually identical fact patterns as there are judges to decide them. Thankfully, *Lemon* has gradually wasted away with age. The prongs have been trimmed. *Lemon* is often ignored,[55] and when invoked, its unworkable tests cause fragmentation in every courthouse in America. The time has come to do away with the *Lemon* test. However, if this Court is not willing to jettison *Lemon*, then substantial revision is necessary. As the political divisiveness consideration has been discarded and the entanglement prong subsumed into the effects prong and limited to institutional entanglement, the purpose prong, *at a minimum*, should be abandoned. If the *Lemon* test is bad, the purpose prong is worse.

The Sixth Circuit opinion illustrates the absurdity of the purpose prong. The court found an improper purpose because the Decalogue, the majority wrote, is "predominantly religious" and out of place with legal and historical documents. The court equated motives with purpose, assumed a religious motivation for the prior displays, and superimposed this alleged motive on the Foundations Display. This flawed reasoning was spawned by the purpose prong. As Justice Scalia, joined by Chief Justice Rehnquist, remarked,

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause

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[55]*See e.g., Grumet*, 512 U.S. at 687; *Zobrest*, 509 U.S. 1 (1993); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982); *Lee v. Weisman*, 505 U.S. 577 (1992); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

> that even the most conscientious government official can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which of course is unconstitutional.

Edwards v. Aguilard, 482 U.S. 578, 636 (1987)(Scalia, J., dissenting).

The purpose prong is not "a proper interpretation of the Constitution," has "no basis in the history" of the First Amendment, "has proven mercurial in application," and should be "abandoned." *Id.* at 615, 640; *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting). The purpose "prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what legislators put into the legislative history and, more importantly, what they leave out." *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting). Either astute or mute legislators can pass the purpose prong, while others not so savvy will flunk the test, when both intend to achieve the same goal. This flaw in the purpose prong has led some members of this Court to question the relevance of legislative motives. *See* footnote 13.

Aside from this case, two cases cited in the Petition further illustrate the problem with the purpose prong. Pet. at 28. The cases of *ACLU v. Mercer County*, 240 F. Supp. 2d 623 (E.D. Ky. 2003)(appeal pending), and *ACLU v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002)(temporarily stayed), have virtually identical displays as before this Court. In *Rutherford County*, the Court struck down the display under the purpose prong but went on to write that it passed the effects prong. The reasoning was that several years prior to the placement of the display a group of county commissioners passed a resolution directing that a single copy of the Ten Commandments be erected. Although this resolution was never acted upon and later repealed, this act alone was found to taint any future acts by the county. In *Mercer County*, the display passed both the purpose and effects prong. In that case there was no prior legislative activity to shed light on the purpose other than the display itself. These divergent rulings mean that the same display is unconstitutional in one building but constitutional in a building across the street because of either past history, statements of some officials, or pure silence. If motives matter, then whose motives? Do we look to the sponsor, some members of the legislative body, letters to government officials by concerned citizens, or some past misstep? If motives matter, then can good motives make a bad act constitutional? Can improper motives make a good law bad? How long do motives and past actions haunt the future? Must we wait almost 200 years for the religious motives that birthed Sunday laws to fade away?

These questions cannot workably be answered until the purpose prong is abandoned. In this case, the actual Foundations Display is most relevant. The objective effects

matter far more than subjective motives. This Court should reverse the decision below and abandon, or significantly modify, the *Lemon* test.

III. AN OBJECTIVE TEST SHOULD BE ADOPTED FOR GOVERNMENT ACKNOWLEDGMENTS OF RELIGION.

"Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 751 (1994)(O'Connor, J., concurring in part).[56] Justice O'Connor has suggested four preliminary categories: (1) government action targeted at particular individuals or groups, (2) government (acknowledgment or) speech on religious topics, (3) government decisions involving religious doctrine and religious law, and (4) governmental delegations of power to religious bodies. *See Grumet*, 512 U.S. at 720. Perhaps government funding could be another category. However, creating too many tests could become confusing.

Caution is required for any test since a "bad test may drive out the good." *Id.* Any test is only as good as the Establishment Clause theory it purports to apply. If the theory is bad, the test will be bad. Tests also have a way of curbing

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[56] *See also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2321 (2004)(O'Connor, J., concurring); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 852 (1995)(O'Connor, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000)(Souter, J., dissenting)(citing *Grumet*, 512 U.S. at 751); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)(no "single test or criterion")(citing cases).

critical thinking. Describing a test as a "guideline" does not solve the problem, because a "guideline" may be used only when convenient. Multiple tests could tend to fragment attempts to create a unifying theme of Establishment Clause jurisprudence. However, multiple Free Speech or Equal Protection tests have not eliminated general unifying themes for both Clauses. The fact is, there are different standards and concerns with funding cases, church property or employment disputes, and government acknowledgments of religion. Establishment Clause concerns are more heightened in the former two than the latter. Government funding of religious activities or judicial inquiry into church practices to resolve property or personnel matters are far more likely to create Establishment Clause concerns than "under God" in the Pledge, "In God We Trust" on our currency, or the passive Displays here that include the Ten Commandments. Any test must strive to separate a real threat from a harmless shadow, an establishment of religion from an acknowledgment.

Justice O'Connor's acknowledgment test set forth in *Newdow*, 124 S. Ct. 2301, may provide a helpful starting point for the development of a new test. The first part of this proposed test focuses on "history and ubiquity." The meaning of ubiquity in this context is not the dictionary meaning of "omnipresent" or "everywhere at the same time" but a practice "observed by enough persons" to warrant the term. *Id.* at 2323. Ubiquity may be less helpful than history. Every practice has had small beginnings, and some practices create new arrangements based on old traditions. Each Presidential invocation of God is both new and old. State mottos, constitutional preambles, the Pledge of Allegiance, and creche displays began at a point in history. Christmas did not begin as a widely celebrated holiday, but it has become so. Pressing

ubiquity too much would mean creches were once impermissible but are now permissible because more people celebrate Christmas. At an extreme, an established church could become permissible because most people have acted in a way over time to establish religion.

Ubiquity seems helpful primarily to the extent it illuminates one of the two aspects of history: historical meaning and historical tutelage. The latter looks at historical practices to distinguish between mere shadows and real threats. History has shown that references to God in our mottos, constitutions, historical documents, and even legislative prayers, have neither established nor tended to establish religion. The presence or lack of controversy seems of less importance. While longstanding practice and the lack of controversy do not give "a vested or protected right" to violate the Constitution, neither does the presence of controversy undercut a constitutional practice. Indeed, litigation can create controversy.[57] If controversy played a significant role, then it would become a "heckler's veto," and Sunday laws and school funding, which have spawned numerous suits, would be doomed.[58] What is relevant, then,

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[57] *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989)(O'Connor, J., concurring)(quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 ("prosecuting a lawsuit" cannot serve to create "divisiveness")(quoting *Aguilar v. Felton*, 473 U.S. 402, 229 (1985)(O'Connor, J., dissenting)).

[58] *Newdow*, 124 S. Ct. at 2320 (Rehnquist, C.J., concurring); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 119 (2001)(refusing to employ "a modified heckler's veto"); *McGowan v. Maryland*, 366 U.S. 420, 435 (1961)("litigation over Sunday closing laws is not novel. Scores of cases may be found in state appellate courts."); *id.* at 527-36 (Frankfurter, J., concurring)(listing cases).

is whether history reveals that a practice has established or tended to establish religion. Historical meaning should seek the best understanding of the Establishment Clause and its purpose. Here there is some agreement, but many differences. Some general assumptions include no established church, no discrimination among sects, and no compelled belief.[59] Despite the divergent opinions beyond these areas, this Court has found historical meaning to be relevant in upholding legislative prayers, property tax exemptions, and creches, noting that "an unbroken practice ... is not something to be lightly cast aside."[60]

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[59]*See, e.g., Newdow*, 124 S. Ct. at 2320 n.4 (Rehnquist, C.J., concurring)(distinguishing between compulsion and coercion); *id.* at 2331 (Thomas, J., concurring); *Good News*, 533 U.S. at 121 (Scalia, J., concurring); *County of Allegheny*, 492 U.S. at 590-91 (summarizing the Establishment Clause); *id.* at 659-63 (Kennedy, J., concurring in part, dissenting in part). *See also* Philip Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 856 (1986); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). There seems to be some agreement on direct coercion and less on indirect.

[60]*Newdow*, 124 S. Ct. at 2324 (O'Connor, J., concurring)(quoting *Walz*, 397 U.S. at 678); *Lynch*, 465 U.S. at 668; *Marsh v. Chambers*, 463 U.S. 783 (1983). Although the contributions of James Madison and Thomas Jefferson are relevant, they are not dispositive. Madison was not an ardent proponent of the Bill of Rights, his original draft was not adopted, his opinions shifted later in life, and he acted in ways some members of this Court describe as falling short of his ideals. Jefferson did not participate in drafting or debating the First Amendment. Both supported prohibiting clergy from holding political office and both condoned confiscating church-owned glebe lands, an act possibly understandable then but an extreme separationist position now. *See Lee v. Weisman*, 505 U.S. 577, 624-26 (1992)(Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 91-99 (1985)(Rehnquist, J., dissenting); *McDaniel v. Paty*, 435 U.S. 618, 623 (1977); Mathew D. Staver and Anita L. Staver, *Disestablishmentarianism Collides with the First Amendment: The Ghost of Thomas Jefferson Still Haunts Churches*, 33 Cumberland L. Rev. 43 (2003). *But see* footnote 61.

The Ten Commandments in general, and the Foundations Display in particular, satisfy the history and ubiquity consideration. References to and displays of the Ten Commandments date from Colonial times to the present. In more than 300 years since the Pilgrims landed in America and 213 years since the First Amendment, there have been only 30 reported cases involving the Ten Commandments: the first in 1973, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th.), *cert. denied*, 414 U.S. 879 (1973); the second was *Stone* in 1980; and 24 since 1999. Litigation strategy designed to make the Ten Commandments a target cannot set aside the Decalogue's longstanding history and ubiquity. When "*illuminated by history,*" the Foundations Display comports with the First Amendment. *Lynch*, 465 U.S. at 678. More importantly, the reality of this history is that passive displays of the Ten Commandments have never tended to establish religion. In the current setting, the Ten Commandments is quite at home with other documents that influenced American law and government.

The Foundations Display also satisfies Justice O'Connor's second consideration – the "absence of worship or prayer." Whether this consideration should receive much weight is debatable. Determining where religious speech ends and worship begins may be tempting but probably not possible. This Court rightly refused to distinguish between speech and worship in *Good News*, 533 U.S. at 111-13, and *Widmar v.*

Vincent, 454 U.S. 263, 271 (1981).[61] The difficulty in making the distinction would likely produce another *Lemon*, not to mention the obvious entanglement problems. At any rate, the cases cited by Justice O'Connor under this consideration primarily deal with young school children in a captive setting, not adults. This Court has made a distinction between coercing young students to pray in a captive environment and prayer where adults may come and go. Passive displays of the Ten Commandments, especially law-based displays like the one before this Court, are no more worship or prayer than the creche or menorah displays upheld by this Court. Viewing the Foundations Display is certainly not a religious exercise.

[61]Some famous historical events included worship and prayer. The cornerstone of the University of Virginia was laid on October 6, 1817, by freemasons in a religious ceremony that was authorized by Thomas Jefferson. *See Letter from Thomas Jefferson to Martha Jefferson Randolph*, (Aug. 31, 1817), *in* The Family Letters of Thomas Jefferson at 418-19 (Edwin M. Betts et al. eds., 1986). Both Jefferson and President James Monroe attended the distinctly religious ceremony, which included three prayers to God and the quotation of portions of Old Testament prophecy taken from Isaiah chapter 28 and Zechariah chapter 3. *See* Chapter 1 of Frank E. Grizzard, Jr., Documentary History of the Construction of the Buildings at the University of Virginia, 1817-1828, (1996)(Ph.D. dissertation, University of Virginia), *available at* <http://etext.lib.virginia.edu/ jefferson/grizzard/> (last visited December 2, 2004). Similar religious ceremonies were conducted for the Washington Monument. *See Construction of the Washington Monument, First Phase 1848-56*, *available at* <http://www.nps.gov/wamo/history/chap2.htm> (last visited December 2, 2004). Jefferson, Madison and other early Presidents attended church services in chambers of Congress, the Supreme Court and the Treasury Building. *See* Library of Congress online exhibit, *Religion and the Founding of the American Republic*, *available at* <http://www.loc.gov/exhibits/religion/rel06-2.html> (last visited December 2, 2004).

The Display also satisfies the third consideration set forth in *Newdow*, namely the Foundations Display is "nonsectarian." Neither the Ten Commandments in particular, nor the Display as a whole, elevate one sect over another. The reference cited by Justice O'Connor here is *Larson v. Valente*, 456 U.S. 228 (1982), a case that dealt with discrimination among religions. This Court has already found that the Sabbath has a secular application and references to God merely acknowledge the historical fact that "we are a religious people" and "[o]ur history is replete with official religious references...." *Lynch*, 465 U.S. at 675 (citation omitted). Since this proposed test is consistent with the endorsement test, the result in *Lynch* would remain the same. There the "chief symbol" of the "Christian religion" was upheld even though its sectarian message was not neutralized. However, the reasonable observer viewing the creche in context and in light of historical tradition did not understand the primary effect of the Display to be an endorsement of religion. *Id.* at 692-94 (O'Connor, J., concurring). The same is true of the Foundations Display.

The Display clearly satisfies the "minimal religious content" consideration. Out of the 8,642 words in the entire Display, of which 1,248 are in the Foundations Document and 199 in the Ten Commandments, the word "God" and "Lord" appear only four times each in the Decalogue, the only document being challenged. Justice O'Connor noted only two of the 31 words of the Pledge were challenged. This amounts to 6.45% of the Pledge. Here, the eight total references to God or Lord make up only 4.02% of the Ten Commandments and an infinitesimal fraction of the entire Display. The problem under this consideration is exactly what just happened, requiring judges to be mathematicians. Stressing the ratio of

religious to secular words could prove to be unworkable and technical. The other factors appear to make this consideration less helpful. At any rate, the Foundations Display passes each consideration.

Perhaps some of the above factors could be supplemented, modified, or replaced by a coercion test. However, the coercion should be more akin to compulsion than to psychological coercion. We are everywhere confronted with governmental acknowledgments. Acknowledgments are far less likely to pose a real threat than other forms of governmental involvement with religion. The Display does not coerce belief or participation in a religious exercise. It is not in the jury room or even the courtroom. In both courts the Display is in the lobby hallway where passersby are not compelled to be. Witnesses or defendants are not compelled to stare at the Display. "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty." *Id.* The "Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part). The Display is not obtrusive nor does it proselytize on behalf of a particular religion. *Id.* at 661. It does not "coerce anyone to support or participate in any religion or its exercise" and does not "give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so." *Id.* at 576. "[I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental

exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 569-60. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662. "Any coercion that persuades an onlooker [to view the Foundations Display] is inconsequential as an Establishment Clause matter, because such acts are simply not religious in character." *Newdow*, 124 S. Ct. at 2327 (O'Connor, J., concurring). Thus, "symbolic references to religion," like the Display, will pass the coercion test. *Id.* There is neither subtle nor direct coercion at issue with the Foundations Display.

Similar to the Ohio Motto ("With God All Things Are Possible") which the Sixth Circuit upheld, the Display

> does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches. Neither does it impose any religious test as a qualification for holding political office, voting in elections, teaching at a university, or exercising any other right or privilege. And, as far as we can see, its [posting by the courthouses] does not represent a step calculated to lead to any of these prohibited ends.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (2001)(en banc).

Whatever the test be, it should comport with history and

not wipe away our heritage. The test should not treat passive displays more harshly than this Court's cases addressing governmental funding. The history of religious school and institutional funding cases supports the argument that eleven passive documents, only one of which contains the Ten Commandments, are constitutional. In 1947 this Court in *Everson* issued its oft-repeated statement about the meaning of the Establishment Clause. Although declaring in broad terms that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions...," *Everson* approved government funding for bus transportation of children attending parochial schools. 330 U.S. at 15-18. This Court has declared that the Establishment Clause permits the following government funding of religious activities or education: vouchers, scholarships, bus transportation, books, teaching materials, projectors, onsite training by public school teachers, interpreters, remedial supplemental education, buildings, revenue bonds, and construction grants.[62] This Court has also approved property tax exemptions, a government-funded hospital run by a Roman Catholic order, and suggested that Medicare funds used by sectarian

[62]*See e.g., Zelman*, 536 U.S. at 639 (vouchers); *Mitchell*, 530 U.S. at 793 (educational materials); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(interpreters); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (counseling); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983)(tax deduction for tuition); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976)(grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973)(revenue bonds for college facilities); *Tilton v. Richardson*, 403 U.S. 672 (1971)(grants for college facilities); *Board of Educ. v. Allen*, 392 U.S. 236 (1968)(loan of textbooks).

healthcare providers pose no constitutional problem.[63] Although a guiding principle in government funding cases centers on neutrally available benefits and private choices, the fact remains the result of such, at least indirectly, is that the religious mission of the institution is advanced. In some cases, children who forgo government funding may lose out altogether on obtaining religious benefits. If the Establishment Clause reaches its apex in government funding of sectarian institutions and education and if government may at least fund such indirectly, the result of which is to advance the religious mission, then how much less does a passive Display on law and government containing one religious/secular document not violate the Establishment Clause? If funding cases have not raised the shadow of an established religion, then the Foundations Display will not. Surely this Court is "unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage, long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed."[64]

[63]*See e.g., Zelman*, 536 U.S. at 667-68 (Medicare); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)(property grant); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)(property tax exemption); *Quick Bear v. Leupp*, 210 U.S. 50 (1908)(treaty and trust funds may be used for religious education); *Braunfield v. Roberts*, 175 U.S. 291 (1899)(religious hospital).

[64]*Lynch*, 465 U.S. at 686. *See also Aguilar v. Felton*, 473 U.S. 402, 419-20 1985)(Burger, C.J., dissenting)("It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks"). The view of Justice Burger, who authored *Lynch*, was later accepted by the majority when *Aguilar* was overruled by *Agostini*, 521

CONCLUSION

The Foundations Display passes every test enunciated by this Court. Whatever test this Court adopts must recognize that an establishment of religion is far different than governmental acknowledgment of religion. The test should include the relevance of historical meaning and tutelage, should comport with the purpose of the First Amendment and should distinguish shadows from real threats. Whether alone or in a contextual display of law as here, the Ten Commandments are part of our history, have not tended to establish a religion, and are consistent with the First Amendment. It is undeniable that the Ten Commandments influenced American law and government. The Foundations Display, which includes the Decalogue, does not violate the Establishment Clause. This Court should reverse, uphold the Foundations Display, abandon or modify the *Lemon* test, and fashion an objective test for acknowledgments of religion that respects our heritage.

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U.S. 203 (1997). History confirms the Archbishop is still held at bay.

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No. 03-1693

Supreme Court, U.S.
FILED
JAN 21 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS, as Pulaski County Judge Executive,

Petitioners,

v.

ACLU OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

In 1999, McCreary County "erected in the McCreary County courthouse a Ten Commandments display," initially consisting of only a "framed copy of one version of the Ten Commandments . . ." [Pet. App. 121a.] It did so pursuant to a fiscal court (county legislature) order, signed by petitioner Jimmie Greene, that "the display be posted in a very high traffic area of the courthouse." [*Id.*]

Similarly, Pulaski County "erected in the Pulaski County courthouse a Ten Commandments display," initially consisting of only a "framed copy of one version of the Ten Commandments . . ." [Pet. App. 144a.] Petitioner Darrell BeShears (the County Judge Executive, or chief executive branch officer) candidly professed his religious purpose in erecting the display: "I've always felt like God comes first, country second and family third." [*See* Joint Appendix (J.A.) 27, #3, Ex. 1 (*News Journal*, July 22, 1999, p.1).][1]

The respondents filed suit on November 18, 1999, contending that the Ten Commandments displays violated the First Amendment's Establishment Clause because they did not serve a secular purpose and had the primary effect of endorsing religion.[2] [J.A. 1 #1, 27 #1.] Within one month after the respondents filed suit, McCreary and

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[1] The Harlan County School District likewise placed stand-alone copies of one version of the Ten Commandments throughout its public school classrooms, *Doe v. Musselman*, 96 F.Supp.2d 667, 671-72 (E.D. Ky. 2000), and the lawsuit challenging the school display was consolidated in the courts below. The school district's petition for review is pending before this Court. *See* No. 03-1698.

[2] The district court held that the individual respondents had standing to bring this suit and that the ACLU of Kentucky had organizational standing. [*See* Pet. App. 116a-118a, 140a-142a.] One respondent in the Pulaski County case, Paul Lee, died during the litigation. [J.A. 37 #39 (Suggestion of Death).]

Pulaski Counties (collectively the Counties) passed resolutions encouraging petitioners Greene and BeShears "to read or post the Ten Commandments as *the* precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded . . ." [J.A. 1 #5 Ex. 1, 28 #6 Ex. 1 (emphasis added).] The resolutions cited: the county magistrates' agreement with Judge Roy Moore's arguments (in response to litigation seeking removal of his Ten Commandments courtroom plaque); a Kentucky legislative acknowledgement of "the inseparable connection between the ethical conduct of that legislative body and the Christian principles which permeate our society and its institutions;" and that body's vote to adjourn an ethics session "in remembrance and honor of Jesus Christ, the Prince of Ethics." [*Id.*]

The Counties then modified their Ten Commandments "display[s] to include several other documents," conceding "that they did so in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." [Pet. App. 120a-121a, 144a-145a.] They also conceded that the displays "purport[ed] to demonstrate America's Christian heritage." [Pet. App. 127a, 151a.] In briefs and at oral argument, the Counties asserted that this Court had "never . . . overruled, limited or even questioned" its finding "as a matter of law, fact and history that America is a 'Christian nation.'" [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (briefs) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892)); 4 #14, 31 #15 (transcript).][3] "[T]o avoid being misunderstood by anyone," the Counties "want[ed] to be

[3] The quoted language is dictum, of course, not the case's holding. And the case involved statutory construction, not the First Amendment. At issue was whether a statute limiting the hiring of foreign workers barred a church from importing an English pastor. *Church of the Holy Trinity*, 143 U.S. at 458.

extremely clear on [their] right, duty and intent to . . . display the Ten Commandments as *the* central historic legal document of the state . . ." [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (emphasis added) (internal quotation marks omitted).] The modified displays were readily visible to the respondents and to other citizens who used the courthouse to conduct routine civic business. [Pet. App. 121a, 145a.]

Instead of stand-alone copies of the Ten Commandments, the Counties' modified displays contained large copies of the Ten Commandments, with smaller copies of eight other documents to the side of or below the Ten Commandments. The eight documents were an excerpt from the Declaration of Independence, the Preamble to the Constitution of Kentucky, the national motto of "In God We Trust," a page from the Congressional Record declaring 1983 the Year of the Bible, a proclamation by President Lincoln declaring April 30, 1863 a National Day of Prayer and Humiliation, an excerpt from President Lincoln's reading "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," a proclamation by President Reagan marking 1983 as the year of the Bible, and the Mayflower Compact. [Pet. App. 121a-122a, 145a-146a.] The excerpted portions of documents were selected to include only that document's references to God or the Bible. [*Id.*]

Upon respondents' motion, the district court preliminarily enjoined these modified Ten Commandments displays in May 2000. [J.A. 5 #15, 31 #16.] Finding that the Counties "narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity and texts that . . . were chosen only for their religious references," the district court deemed the modified displays to have a purpose and effect of endorsing religion. [Pet. App. 129a, 153a.]

Several months later – after filing and dismissing an appeal from the preliminary injunction, obtaining new counsel, and unsuccessfully seeking clarification of the preliminary injunction's scope, – the Counties erected their third Ten Commandments displays. In the interim, they neither repealed nor amended their authorizing resolutions; nor did they pass any other relevant resolution. The sole legislative authorization for the third Ten Commandments displays thus consisted of the December 1999 resolutions, which encouraged petitioners Greene and BeShears "to . . . post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded . . . ," and cited with approval Judge Roy Moore's arguments, Kentucky's legislative acknowledgement of "the . . . connection between [legislative] . . . ethical conduct . . . and the Christian principles which permeate our society and its institutions," and the legislature's adjournment "in remembrance and honor of Jesus Christ, the Prince of Ethics." [J.A. 1 #5 Ex. 1, 28 #6 Ex. 1.]

This time, instead of surrounding the Ten Commandments with text and excerpts focusing on religion, the Bible or Christianity, the Counties surrounded the Ten Commandments with American (and earlier Colonial and British) political and patriotic texts, song lyrics and a picture – three of which appeared in the second display – and an "explanatory" text. [Pet. App. 97a-98a (detailing contents of displays).] All framed documents were of similar size. The framed copy of the Ten Commandments in each courthouse display contained a Biblical reference, identifying the Ten Commandments as deriving from the

"King James Version" of "Exodus 20:3-17." [*Id.*][4] The explanatory text stated that the "display contains documents that played a significant role in the foundation of our system of law and government." [Pet. App. 179a.] Its full explanation for including the Ten Commandments' was that:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

[Pet. App. 180a.] Upon further motion, the district court supplemented its preliminary injunction to enjoin the third version of the Counties' displays. [Pet. App. 112a-114a.] The court concluded that, "[i]n light of the history" of the Counties' actions and this Court's analysis in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Counties "were not motivated by a secular purpose in posting" their third displays; instead, their "clear" true purpose was "posting the Ten Commandments." [Pet. App. 107a.] The district court also concluded that, "[g]iven the religious nature of this document, placing it among these patriotic and political documents, with no more religious symbols or

[4] The Counties apparently deleted these references after oral argument on the supplemental preliminary injunction motion. [Pet. App. 98a.]

moral codes, imbues it with a national significance constituting endorsement." [Pet. App. 109a (footnote omitted).]

A divided Sixth Circuit panel affirmed, with two judges agreeing that the counties' purpose was primarily religious. [Pet. App. 16a-42a.][5] In addressing whether the predominant purpose for the Counties' displays was religious, the appeals court read *Stone*, 449 U.S. at 42, to require that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message." In the courthouse context, "[t]he government achieves this goal by ensuring that the symbols, pictures and/or words in the display share a common secular theme or subject matter." [Pet. App. 21a-22a.] And the Court examined three factors "when assessing whether the Ten Commandments have been presented objectively and integrated with a secular message: the content of the displays, the physical setting in which the Ten Commandments are displayed and any changes . . . made to the displays since their inception." [Pet. App. 22a.] The panel found that all three factors – content, context and evolution of the display – showed a predominantly religious purpose. [Pet. App. 27a-42a.]

The full Sixth Circuit denied *en banc* review, with two judges dissenting and two concurring. [Pet. App. 163a-176a.] This Court granted the Counties' petition for a writ of certiorari on October 12, 2004.

[5] One judge also voted to affirm because the displays' primary effect was to endorse religion; one judge declined to reach that issue; one judge voted to reverse. The purpose and effect of the Counties' displays thus were raised and preserved in both courts below.

SUMMARY OF ARGUMENT

Three times in a little more than a year, Pulaski and McCreary counties, Kentucky, erected Ten Commandments displays in highly visible locations in their county courthouses. The courthouses are the seats of all three branches of county government. The third displays, at issue here, contain one Protestant version of the Decalogue, surrounded by political and patriotic texts, song lyrics and a picture. The identical displays are entitled "Foundations of American Law and Government." An explanatory text describes the reason for the Ten Commandments' inclusion: "The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." The Ten Commandments are also said to "have profoundly influenced the formation of Western legal thought and the formation of our country." The counties' two earlier displays consisted of: a stand-alone copy of the Ten Commandments; and a copy of the Ten Commandments surrounded by documents and textual excerpts focusing on religion, the Bible or Christianity.

The Decalogue expresses religious messages central to Jews and Christians. *Stone v. Graham*, 449 U.S. 39, 41 (1980). Different textual versions reflect deep historical and religious disputes among Christian religions and between Christians and Jews. Displaying one version necessarily favors one religion ver others. And, because the Ten Commandments express religious beliefs that are central only to Jews and Christians, displaying the Decalogue necessarily disfavors those with other religious beliefs or none at all. This the Counties may not do. *See, e.g., Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("absolut[ely] prohibit[ing]" such favoritism); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("one

religious denomination cannot be officially preferred over another").

The counties' third Ten Commandments displays violate the First Amendment's Establishment Clause because they have the impermissible purpose and effect of endorsing religion. This Court repeatedly has struck down governmental actions that lacked a sincere secular purpose. *See Stone*, 449 U.S. at 41-42 (rejecting asserted secular purpose for posting Ten Commandments on classroom walls); *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (rejecting asserted secular purpose for teaching "creation science"); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (rejecting asserted secular purpose for requiring moment of silence). And it has held that courts have a "duty . . . to distinguis[h] a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quotation marks omitted) (brackets supplied in *Santa Fe*); *Aguillard*, 482 U.S. at 586-87 (statement of purpose must be "sincere and not a sham").

The Counties' purpose – to display the Decalogue – is revealed in the litigation history, the content of the display itself and the relevant social context. In this litigation, the Counties have described the Ten Commandments as "*the* precedent legal code of the Commonwealth," as "*the* central historic legal document of the state" and now as "*the* foundation of our legal tradition," providing "*the* moral background of the Declaration of Independence." They have erected displays highlighting the religious nature of the Ten Commandments. They have announced their purpose of demonstrating "America's Christian heritage." They argued to the district court that current law holds "that America is a 'Christian nation.'"

The displays' content also reveals the Counties' purpose. The Counties' articulated purpose before this Court – to "educate about law" and to display "some

documents that played a role in the foundation of our system of law and government" – is a sanitized version of what the displays actually say; and these displays are a toned down version of prior displays. History does not support the displays' assertion that the Ten Commandments provide the foundation of our legal system. On the contrary, the clear historical record is that the Decalogue, while it (like other ancient moral codes) informed our notions of right and wrong, played virtually no role in the drafting or adoption of our nation's founding documents. Nor are the parallels between three Commandments and secular law proof of causation, for those bans on killing, stealing and perjury are universal and existed in English law since before the English were Christianized. Moreover, the Declaration of Independence and the Decalogue address distinct concepts – one, the relation of individuals to a deity and each other, the other, the relation of individuals to government. There is no facial or historical link between the two and the displays themselves offer no evidence to support the Counties' bald assertion that the Decalogue provided the "moral background" for the Declaration.

The displays' content, context and location all lead the reasonable observer to view them as symbolically endorsing religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (symbolic endorsement violates Establishment Clause). The observer would perceive the displays to assert the central role in our nation's history played by one set of religious beliefs – an assertion that is not borne out by the record and, ultimately, is an assertion of faith itself. The reasonable observer also would understand that, by linking the Decalogue to our nation's founding documents and central precepts, and by trumpeting that link at the seat of all three branches of government, the Counties endorsed the Decalogue.

The Counties' permanent displays of one version of text expressing core religious beliefs of some, but not all, Protestants, and the Counties' assertions that those religious beliefs provided "*the* foundation of our legal tradition" and "*the* moral background of the Declaration of Independence," thus lacks any secular purpose and conveys the Counties' message that it endorses that religious message.

ARGUMENT

I. THE TEN COMMANDMENTS CONTAIN AND EXPRESS A RELIGIOUS MESSAGE.

A. The Ten Commandments Are Inherently Religious.

The Ten Commandments derive from the Torah, Exodus 20 and Deuteronomy 5. Jewish tradition teaches that God gave the Ten Commandments to Moses on Mt. Sinai (about 3200 years ago). For this reason, many Christians and Jews deem the Ten Commandments sacred.[6] Jews deem the Commandments a "statement of faith;" both Jews and Christians deem them a statement of rules. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 Fordham L. Rev. ___, 2 (forthcoming March 2005) (*Finkelman*).[7] Although the Ten Commandments can be divided into groupings that

[6] There are at least five versions of the Ten Commandments in use by Jews, Catholics and Protestants. (The Counties displayed a Protestant, "King James," version.) *See generally*, Steven Lubet, "The Ten Commandments in Alabama," *Constitutional Commentary*, at 471, 474-75 (1998) (*Lubet*).

[7] The author has furnished counsel with a copy of the manuscript, which is scheduled for publication in March 2005. Because page numbers for the published article are not yet available, we cite here to the manuscript pages.

concern God and those that do not, believers see the Ten Commandments as a unitary document, given to humans by their deity, and held together by their initial pronouncement that "I am the Lord thy God."

This Court already has recognized that the Ten Commandments send a thoroughly religious message. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). There, the Court summarily struck down a Kentucky law requiring schools to post copies of the Ten Commandments. Kentucky required that each Ten Commandments display include the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41. This Court was not persuaded by Kentucky's effort at secularization: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted). *See also id.*, 449 U.S. at 41-42 ("The Commandments do not confine themselves to arguably secular matters . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.") (footnote and citations omitted). Scholars uniformly confirm what the *Stone* Court found.[8]

[8] Lower court decisions after *Stone* have understood that the Ten Commandments are a religious text. *See Adland v. Russ*, 307 F.3d 471, 480 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *Harvey v. Cobb*

(Continued on following page)

The Ten Commandments contain "two main types of *religious* law: those pertaining to the individual's obligations toward God and those pertaining to . . . relations with other people." Baruch J. Schwartz, "Ten Commandments," in *The Oxford Dictionary of the Jewish Religion* (*Oxford*) (emphasis added). The first five commandments, sometimes known as the first "table," concern one's relationship with God.[9] *See* Walter Bruggeman, "Exodus 20:1-17, The Ten Commandments" in 1 *The New Interpreter's Bible: General Articles* 839 (1994) (*New Interpreter's Bible*). They often are grouped as follows:

> *Commandments 1-3*: God's self-identification, followed by commandments against the worship of other gods, idolatry, and the misuse of the divine name (*Ex.* 20:1-7, *Dt.* 5:6-11). *Commandments 4-5*. Positive commands to observe the Sabbath and to honor parents (*Ex.* 20:8-12, *Dt.* 5:12-16).

Walter Harrelson, "Ten Commandments," in 14 *The Encyclopedia of Religion* 395 (1987) (*Encyclopedia*).

The first three commandments "concern seductive ways in which the God of the exodus is diminished or trivialized." *New Interpreter's Bible* at 842. "I am the Lord thy God" is considered by some religions a prefatory statement, by some a separate Commandment, and by others as part of the First Commandment, along with "Thou shalt have no other gods before me." *Compare Oxford* at 684 *with Lubet* at 475. "In its theology, the first striking feature of the Decalogue is its monotheism." L. W. Batten, "Decalogue," in 4 *Encyclopedia of Religion and*

County, 811 F. Supp. 669, 677-78 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir.) (table), *cert. denied*, 511 U.S. 1129 (1994).

[9] As detailed in § I.B, the mere numbering of the Commandments reflects a choice among competing religions and versions. Here, we number the Commandments consistent with the Counties' display.

Ethics 517 (1959) (*Religion and Ethics*). "[W]hatever its original meaning, it was ultimately interpreted as an uncompromising prohibition of the worship of any deity other than [Y]ahweh." *Id.* The First Commandment "insists . . . that other gods must receive none of Israel's loyalty or allegiance." *New Interpreter's Bible* at 841. Its concern "is for the priority of God in human experience. . . . God is to be the center, the hub, the core, the compelling focal point of meaning and power around which every individual life and the whole of human society is to be organized." Owen M. Weatherly, *The Ten Commandments in Modern Perspective* (1961), at 12 (*Modern Perspective*). The First Commandment leaves no place for argument about the existence of God, *see id.*, and explicitly prohibits a belief in multiple gods. *See id.* at 14.

The Second Commandment generally is understood as prohibiting idols, images, or other representations of God, "the assignment of theological significance to any element of creation, the investment of ultimacy in what is not ultimate." *New Interpreter's Bible* at 842. Idolatry is deemed "the worst form of sin" because it "arouses the jealousy of [Y]ahweh" and "[h]ating [Y]ahweh is synonymous with idolatry." *Religion and Ethics* at 517. Its concern is "for the true worship of God," *Modern Perspective* at 25, and it "presents God as the Creator and Ruler of the universe who because of his absolute sovereignty is able to deal mercifully and redemptively with man in his moral failure." *Id.* at 37. However, some religions (including Catholicism) do not include the prohibition against "graven images" in their representations of the Ten Commandments. *See Lubet* at 475.

The Third Commandment prohibits the taking of God's name in vain. "It is unanimously agreed that this commandment protects the name of Yahweh from that unlawful use which could take place in the oath, the curse, and in sorcery." J.J. Stamm and M.E. Andrew, *The Ten*

Commandments in Recent Research, 89 (1967). The primary violation "is to make Yahweh (who is an ultimate end) into a means for some other end." *New Interpreter's Bible* at 842. It calls for "sincerity and faithfulness in man's relationship with God," *Modern Perspective* at 39, and "rests squarely on the Hebrew doctrine of man's creation in the image of God." *Id.* at 52-53.

The Ten Commandments also hold a prominent place in Christian and Jewish worship services. *See New Interpreter's Bible* at 853 ("in some older Christian liturgies, the commandments are recited at baptism"); *Encyclopedia of Religion* at 396 ("[t]he Ten Commandments became a fixed part of Christian catechetical practice and worship"); *Dictionary of Jewish Religion* at 684 ("[r]epresentations of the Decalogue are . . . prominently displayed in synagogues . . . and the biblical festival of Shavu'ot became, in rabbinic tradition, a commemoration of the day on which the Decalogue was heard. When the Ten Commandments are recited in the course of the Torah reading, the congregation rises to its feet").

But the Ten Commandments are not universally accepted. They are central only to the Jewish and Christian faiths. They are less significant in Islam and have no role in Eastern religions. *See* Brief of Anti-Defamation League, et al., as *Amici Curiae* (ADL Br.) at 10; *see also Finkelman* at 2 ("[T]he Commandments have no place at all in Hinduism, Buddhism, Taoism, or other non-western faiths. Moslems consider the Jewish Bible to be a holy text, and thus the Ten Commandments may have some religious value, but are clearly not central to the faith.") They are not a generic invocation of a deity, but "are clearly religious and sectarian." *Id.* Government promulgation of the Ten Commandments thus necessarily prefers Judaism and Christianity over other religious traditions. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 615 (1989) (Blackmun, J., concurring) (First

Amendment prohibits endorsement of two religions no less than endorsement of one).

B. Because Textual Variations Reflect Deep Religious and Historical Disputes, The Counties' Selection Of One Version Of The Ten Commandments Constitutes A Sectarian Choice.

The Counties chose to display text, not mere symbols (such as Moses carrying stone tablets or tablets containing Roman numerals I through X). Choices matter. Symbols express universal themes. Subtlety and understatement expands the interpretive possibilities; explication limits it.

The depiction of Moses carrying two stone tablets on this Court's frieze thus differs materially from the Counties' displays. The frieze is allegorical, symbolic; the text is explicit, precise (and chosen among competing options). The frieze is seen at a distance; the framed text can (and is meant to) be read up close. The frieze is part of a broad display of comparable historical figures, lawgivers; the text is not.[10]

Artistic depictions of the Ten Commandments as symbols thus face no threat here. The Counties' display of Biblical text surrounded by political and patriotic documents is unlike courthouse murals, sculptures and carvings. Those displays of tablets, tablets held by Moses, tablets with Roman numerals, or tablets with Hebrew or English writing, must be gauged in context.[11] Petitioners never have argued that every depiction or use of the Ten Commandments is unlawful. Indeed, *Stone* forecloses that

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[10] We address whether documents surrounding the Ten Commandments secularize the display in § II.B.2.

[11] We express no view about the constitutionality of any particular artistic display.

argument. *Id.*, 449 U.S. at 42 ("This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like"). The States thus are quite wrong to suggest that affirmance here will require removal of John LaFarge murals and ornamental friezes. *See* Brief of the States of Minnesota, et al., as *Amici Curiae* at 2-4, 9-11; *see also* Brief of American Center for Law and Justice as *Amicus Curiae* at 15 (describing Supreme Court frieze as "acceptable accommodation . . . of a religious . . . display"); Brief of the States of Alabama, et al., as *Amici Curiae* at 4-7 (describing various displays). On the contrary, as Justice Stevens explained:

> . . . [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." . . . Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring) (footnote and internal citations omitted).

It is "quite impossible to have a theologically 'neutral' version of the Ten Commandments." *Finkelman* at 18.

In choosing to display text, the Counties had to select among competing religions' versions of the Ten Commandments. The Counties repeatedly chose a Protestant "King James" version – and, until nearly the end of litigation in the district court, said so expressly in their displays.[12] [*See* Pet. App. 98a.] The choice of text displayed created a denominational preference because "there are at least five distinctive versions of the Decalogue. In some cases differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." *Lubet* at 474 (footnote omitted); *Finkelman* at 7 (identifying "at least four separate versions of the Ten Commandments: Jewish, Catholic, Lutheran, and general Protestant") (footnote omitted); *see also* ADL Br. at 11-18 (detailing how Ten Commandments have been historical source of tension between Jews and Christians); *id.* at 18-21 (describing "Judeo-Christian tradition" as 20th Century concept that "masks an assimilation of minority Jewish and Catholic religious practices into the general American Protestant ethos").

For example, the First Commandment for Jews is "I the Lord am your God, who brought you out of the land of Egypt, the house of bondage; You shall have no other gods besides Me." *Exodus* 20:1 (translation found in W. Gunther Plaut, ed., *The Torah: A Modern Commentary* (1981)). It is a statement of faith, identifying the God who brought the Israelites out of Egypt. *Finkelman* at 11. It can apply only

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[12] The petitioners are "baffl[ed]" how the Ten Commandments can be an active symbol of religion while a crèche is not. Pet. Br. at 12. Both the crèche and the Ten Commandments convey a religious message that the government is barred from communicating except in certain circumstances, where the larger context dispels any message of religious endorsement. By referring to the Ten Commandments as "active," the Sixth Circuit was simply indicating that the displays' explicit text eliminates any ambiguity about its religious message.

to Jews, so no Christian version includes it. *Id.* Some versions deem the first phrase as introductory to the Commandments themselves; only the last portion appeared in the Counties' displays. [*See* Pet. App. 189a ("Thou shalt have no other gods before me").] The Counties' displays thus deleted a central component of the Torah version – the emphasis on God's covenant with the people of Israel. *See* ADL Br. at 9.

The prohibition against graven images, of great importance to some denominations, *see Modern Perspective* at 25-38, is a Commandment "not found anywhere in the version used in the standard Catholic catechism," which splits the Tenth Commandment in two to take its place. *Lubet* at 475. Inclusion of this prohibition "reflects ideological and theological aspects of Protestant reformation in most of Europe." *Finkelman* at 12.[13] The Counties' displays reflect "mainstream Protestant theology." *Id.* Similarly, the Catholic version has "Honor your mother and father" as the Fourth Commandment, while the Protestant and Jewish versions have "Remember the Sabbath and keep it holy." *See* Rob Boston, *The Ten Commandments: A Sequel*, Church & State 10 (July/August 2001). In each case, the Counties have chosen the Protestant version over the Catholic version.

[13] Catholic and Protestant theological differences are reflected in translations too. The King James version of the Bible translates the fourth verse of Exodus 20 as "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth." *Finkelman* at 20. The Catholic *New American Bible*, on the other hand, translates the verse as "You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth." *Id.* The difference is one of substance, not just semantics. The Protestant version bars graven images *and* images of water, land or sky animals. The Catholic version bars only images *of* those animals. *Id.* 20-21.

Even the phrase "Thou Shalt Not Kill" expresses a denominational preference because "[t]hat is not what the text says in the original Hebrew;" it says "Thou shalt not murder." *Harvey*, 811 F. Supp. at 672, *aff'd*, 15 F.3d 1097 (11th Cir. 1994) (table), *cert. denied*, 511 U.S. 1129 (1994) (quoting testimony of Rabbi Shalom Lewis) (internal quotation marks omitted). The difference may seem minor, but the difference between "kill" and "murder" has important theological implications. *See, e.g., Modern Perspective* at 92 ("Thou shalt not kill" bars capital punishment); *id.* at 97 ("Thou shalt not kill" bars war); *see also Finkelman* at 22 (the pacifist beliefs of denominations such as Quakers and Mennonites stem from this translation). By labeling the display "The Ten Commandments," the Counties have chosen one Protestant version as correct and rejected Jewish and Catholic versions as incorrect.

In choosing to display a version of the Ten Commandments, the Counties took sides in longstanding theological debates. *See Stone v. Graham*, 599 S.W.2d 157, 160 (Ky. 1980), *rev'd*, 449 U.S. 39 (1980) (Lukowsky, J., dissenting) (discussing "the dissension which arose when the Superintendent of Public Instruction invited a committee of various religious leaders . . . to decide what should be the 'official' language of the Ten Commandments to be printed. . . . The Commonwealth admitted at oral argument that this group was unable to agree."). Because of the deep theological differences underlying them, "the different rendering of the Ten Commandments is used as ammunition in . . . classic religious assault[s]." *Lubet* at 476 (providing examples). Simply put, the Ten Commandments are not "a universally accepted list of 'dos and don'ts' . . ." *Finkelman* at 9.

The specific wording in the Counties' displays prefers certain religious sects in other ways. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("[t]he clearest command of the Establishment Clause is that one religious denomination

cannot be officially preferred over another"). By explicitly asserting the existence of a God, the display endorses theistic sects over non-theistic sects (such as Buddhism). *See, e.g., Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) ("Many Americans who consider themselves religious are not theistic"). By using the singular "I am the Lord thy God," the displays exclude polytheistic sects, such as Hinduism. *See, e.g.*, 4 *Religion and Ethics* 517 ("in its theology the first striking feature of the Decalogue is its monotheism"). By using the masculine God over the feminine Goddess, the displays embody a particular conception of the ultimate nature of the deity. "The Ten Commandments are more than just symbolic, they are explicit textual references to [religious] beliefs. Unlike other symbolic or pictorial displays (such as a creche or Christmas tree) with possible religious connotations, the text of the Ten Commandments harbors deeper and more explicit meanings." Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establishment Clause*, 39 S. Tex. L. Rev. 101, 116 (1997) (footnotes omitted).

Even if one were to ignore the significant theological differences among Ten Commandments versions, "[t]he simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *Allegheny*, 492 U.S. at 614-15 (Blackmun, J., concurring) (footnote omitted). The Counties' displays give particular preference to some religions and not to others. Moreover, because "[a]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands," *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring), any reasonable observer will understand that the Ten Commandments displays appear on the courthouse walls with

governmental approval. *See* Brief of Baptist Joint Committee, et al., as *Amici Curiae* (BJC Br.) at 2-3 (arguing that the Counties presumably endorse what they display).

II. INCLUSION OF THE TEN COMMANDMENTS IN THE COUNTIES' COURTHOUSE DISPLAYS HAS THE IMPERMISSIBLE PURPOSE AND EFFECT OF ENDORSING RELIGION.

A. The Counties' First And Second Displays Were Plainly Unconstitutional.

"The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief," *Allegheny*, 492 U.S. at 593-94, or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

To survive scrutiny, publicly displayed religious text must not have "the purpose or effect of 'endorsing' religion." *County of Allegheny*, 492 U.S. at 592 (citing *Engel v. Vitale*, 370 U.S. 421 (1962)); *see also Santa Fe*, 530 U.S. at 301-02 (asking whether schools endorsed religion by permitting student-led prayer before high school football games). The endorsement test, which modifies the original *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), prohibits governmental "endorsement or disapproval" of religion. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).[14]

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[14] *Lemon* asked whether challenged governmental activity had a secular purpose, had an effect that furthered or inhibited religion, or had excessive entanglement. *Id.*, 403 U.S. at 612-13. The endorsement test asks whether the activity has the purpose or effect of endorsing religion. *See, e.g., Wallace*, 472 U.S. at 69 (endorsement "requires courts to examine whether government's purpose is to endorse religion and

(Continued on following page)

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Id.

The Counties' first two displays plainly were unconstitutional. The first displays consisted of a Protestant version of the Ten Commandments, hanging alone and readily visible on the courthouse wall. It was worse than the freestanding display struck down in *Stone* because it lacked that display's disclaimer. The disclaimer at least purported to assert a secular purpose for the display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41.

This Court deemed the disclaimer insufficient to show a secular purpose and summarily declared that the display violated the First Amendment. "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted). Whatever the government's stated purpose, this Court understood the true purpose of posting the Ten Commandments on walls:

> Posting of religious texts on the wall serves no [purported] educational function. If the posted copies of the Ten Commandments are to have

whether the statute actually conveys a message of endorsement") (O'Connor, J., concurring).

> any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Id., 449 U.S. at 42. Substitute citizens for schoolchildren,[15] delete the purported educational purpose, and the *Stone* display becomes the Counties' first displays.

The Counties' second displays were even worse. The Counties announced a purpose that was unabashedly religious: demonstrating "America's Christian heritage." [Pet. App. 127a, 151a.] They felt free to do so because they read current law to hold "that America is a 'Christian nation.'" [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (citing *Church of the Holy Trinity*, 143 U.S. at 471 (1892)).] They proclaimed the Ten Commandments "as *the* central historic legal document of the state . . ." [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (emphasis added).] And they erected a display that highlighted the religious nature of the Ten Commandments: a large framed copy of the Decalogue accompanied by smaller copies of documents and excerpts selected to include only references to God or the Bible. [Pet. App. 121a-122a, 145a-146a.]

The district court rightly and easily deemed the second displays to have the purpose and effect of endorsing religion and preliminarily enjoined their continued posting. [J.A. 5 #15, 31 #16.] Nor do the petitioners appear to quarrel with the conclusion that the second displays violated the Establishment Clause. They abandoned their

[15] Although this Court has been "particularly vigilant" in monitoring Establishment Clause compliance in the schools, *Aguillard*, 482 U.S. at 583-84, it never has limited application of Establishment Clause principles to the school setting. *See, e.g.*, *Allegheny*, 492 U.S. 573; *Capital Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995).

appeals from the preliminary injunctions. [J.A. 11 #39; 37 #40.] They make no effort to defend those displays in their merits brief. Indeed, they strive to distance themselves from their earlier displays:

> The [Sixth Circuit] used the prior displays to "taint" the [current display]. . . . The [current display] is unlike any prior display. The [current display] is not devoid of a secular purpose. Even if Petitioners were deemed to have begun with a wholly religious purpose, they did not end with one. The [current display] itself is more relevant to purpose than shadows of the past . . .

Pet. Br. at 13.

No court ever has upheld a display like the Counties' second displays. No one here argues that those displays were constitutional. Thus, while courts have disagreed about the Eagles monuments at issue in *Van Orden*, *compare Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted* (Oct. 12, 2004), *with Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003), and the displays at issue here, *compare ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted* (Oct. 12, 2004), *with ACLU of Kentucky v. Mercer County*, 240 F. Supp. 2d 623 (E.D. Ky. 2003), *appeal pending*, there can be no serious question that the Counties' earlier displays were patently unconstitutional.

B. The Counties' Third Displays Failed To Cure Their Earlier Establishment Clause Violations.

1. The litigation history, displays' content and social facts all show that the Counties lacked a sincere secular purpose.

Where "a governmental intention to promote religion is clear," *Aguillard*, 482 U.S. at 585, this Court has not

hesitated to hold the challenged conduct unconstitutional. Thus, the Court has invalidated Louisiana's creationism statute, *Aguillard*; struck down a Kentucky law requiring the posting of the Ten Commandments in public schools, *Stone*, 449 U.S. 39; struck down Alabama's moment of silence statute, *Wallace*, 472 U.S. 38; invalidated student-led prayer at high school football games, *Santa Fe*, 530 U.S. 290; and held unconstitutional the mandated daily reading of Bible verses and the Lord's Prayer in public schools. *Schempp*, 374 U.S. 203. In each case, this Court held that the challenged conduct was motivated by a religious purpose, and rejected the government's assertion of a sincere nonreligious purpose.

Nor is the requirement of a secular purpose "satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). While a government's professed secular purpose for an arguably religious policy is entitled to "some deference," it is "the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 75) (brackets supplied in *Santa Fe*); *Aguillard*, 482 U.S. at 586-87 (statement of purpose must be "sincere and not a sham"). The secular purpose requirement thus "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

Distinguishing a sham secular purpose from a sincere one requires "examination of the circumstances surrounding [the governmental] enactment." *Santa Fe*, 530 U.S. at 315. Judicial assessment of governmental purpose is largely "a legal question to be answered on the basis of judicial interpretation of social facts . . . Every government

practice must be judged in its unique circumstances . . ." *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring). The Court "need not be blind . . . to the [governments'] religious purpose . . ." *Aguillard*, 482 U.S. at 590.

In these unique circumstances, there are three reasons for concluding that the Counties' third Ten Commandments displays lacked a sincere secular purpose. First, the litigation history undermines the Counties' credibility. Second, the displays' content is inconsistent with – and thus cannot "serve" – the Counties' professed secular purpose. Third, the district court's intimate familiarity with the social facts – especially at this stage of the case[16] – warrants deference to its conclusions here.

a. The litigation history.

Until the last moment, the Counties made no secret of their desire to trumpet Christian heritage by displaying the Ten Commandments. They first posted stand-alone copies of the Ten Commandments, with one petitioner declaring that "God comes first." Within one month after the respondents filed suit, the Counties declared the Ten Commandments to be *the* precedent legal code of the Commonwealth of Kentucky, applauded Judge Roy Moore's efforts to prevent removal of his Ten Commandments courtroom plaque, and lauded legislative citation of Christian principles and remembrance and honor of Jesus Christ, the "Prince of Ethics."

The Counties' second displays purported to demonstrate America's "Christian heritage." The Counties argued that, under current law, America is a "Christian nation." They proclaimed the Ten Commandments as *the*

[16] The case has proceeded on appeal for three and a half years from a supplemental preliminary injunction. Throughout much of the litigation, the trial court has stayed proceedings on petitioners' motion (and over respondents' objections). [*See* J.A. 22, #78, 24 #87.]

central historic legal document of the state and, for that reason, wanted to be "extremely clear" that they asserted the right, duty and intent to display the Commandments. They did so by surrounding large copies of the Ten Commandments with smaller copies of other documents and excerpts selected only for their religious references.

The Counties then hired new lawyers.

Within months, the same elected officials of the same Counties erected toned-down Ten Commandments displays. This time, they announced that the Ten Commandments "provide *the* moral background of the Declaration of Independence" and "*the* foundation of our legal tradition." (Emphasis added.) The displays asserted that the equal-sized framed documents, including the Ten Commandments, "played a *significant* role in the foundation of our system of law and government." (Emphasis added.)

This litigation history thus mirrors *Santa Fe*. There, school policy had the student council chaplain deliver a prayer over the public address system before each varsity football game. *Id.*, 530 U.S. at 294. After parents and students filed suit challenging the practice, the schools adopted a policy containing alternative provisions: one permitted students to opt for pregame prayer, *id.*, 530 U.S. at 297-98; the other permitted students to opt for nonsectarian, nonproselytizing, pregame prayer. *Id.* The latter provision would go into effect only if a court enjoined the former. *Id.* The schools then adopted a final policy substituting "messages," "statements" and "invocations" for "prayer." *Id.*, 530 U.S. at 298. The validity of only final policy was before the Court. *Id.*

The schools identified the secular reasons for the policy as "foster[ing] free expression of private persons[,] . . . solemniz[ing] sporting events, promot[ing] good sportsmanship and student safety, and establish[ing] an appropriate environment for competition." *Id.*, 530 U.S. at 309 (quoting

from merits brief). While those purposes are facially secular, deference did not require the Court to take them at face value. Rather, the Court noted that an "invocatio[n] is not necessary to further any of these purposes" and that the "policy does little to foster free expression." *Id.* (internal quotation marks omitted). The Court found "[m]ost striking" the policy's "evolution . . . from . . . 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation." *Id.* This "history indicates that the [schools] intended to preserve the practice of prayer before football games." *Id.*

Santa Fe came to the Court "as the latest step in developing litigation . . ." *Id.*, 530 U.S. at 315. The "narrow question" was whether implementation of the final policy "insulates the continuation of [pregame] prayers from constitutional scrutiny." *Id.* Because "inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment," *id.*, the Court held that "[i]t d[id] not."

Here too, the petitioners seek to avoid scrutiny of anything other than their final asserted purpose. But because the third displays are "the latest step in developing litigation," they cannot "insulate the continuation of [Ten Commandments displays] from constitutional scrutiny." *Id.* Moreover, posting the Ten Commandments is not necessary to further the Counties' asserted secular purpose of "educat[ing] about law," or about "some documents that played a role in the foundation of our system of law and government." Pet. Br. at 5, 9.

The district and circuit courts rightly understood that the third displays were the latest in a logically-connected series with one common purpose: posting the Ten Commandments at the seat of (all three branches of) the Counties' government. The Counties were willing, if necessary, to eliminate the size difference between the Ten

Commandments and surrounding documents; they were willing, if necessary, to surround the Ten Commandments with religiously-neutral documents.[17] But they were unwilling to significantly alter their characterization of the debt America's civil government owed to these core religious beliefs. Kentucky's assertion in *Stone* that the Ten Commandments had been adopted "as the fundamental legal code of Western Civilization and the Common Law of the United States" became, twenty years later, the Counties' assertions that the Ten Commandments were "the precedent legal code of the Commonwealth of Kentucky," then the "central historic legal document of the state," and finally "the foundation of our legal tradition," providing "the moral background of the Declaration of Independence."

In rejecting the Counties' professed secular purpose, the district and circuit courts properly fulfilled their "duty . . . to distinguish a sham secular purpose from a sincere one." *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 75) (brackets and internal quotation marks omitted). They did not – as the petitioners and several of their *amici* argue, *see, e.g.*, Pet. Br. at 13-14, Brief of the United States as *Amicus Curiae* (U.S. Br.) at 25, Brief of Thomas More Law Center as *Amicus Curiae* at 6 – deem prior unconstitutional displays to permanently and irrevocably "taint" future displays. On the contrary, the lower courts took the Counties' earlier articulated purposes into account in assessing whether the latest – supposedly secular – purpose was a sham. And this Court's cases require them to do so. *See, e.g., Santa Fe*, 530 U.S. at 308, 315; *Wallace*, 472 U.S. at 75; *Aguillard*, 482 U.S. at 586-87, 590.

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[17] Several of the documents refer formalistically to God. Respondents do not assert that those references convert the political documents into religious ones.

b. Content.

The displays are not an "integrated . . . curriculum," *Stone*, 449 U.S. at 42, but a grab-bag of loosely related political and patriotic items – except for the Ten Commandments, which are an explicitly religious text. Petitioners assert that the display's purpose is to "educate about law," or about "some documents that played a role in the foundation of our system of law and government." Pet. Br. at 5, 9. For the reasons detailed below, petitioners' assertions about the Ten Commandments' foundational role are wildly exaggerated, requiring a leap of religious faith in the absence of historical support. But the content reveals more: because the displays rest on the fundamentally flawed premise that the Ten Commandments provide *the* moral background of the Declaration of Independence and *the* foundation of our legal tradition, the displays' content reinforces the conclusion drawn from the litigation history – that the Counties' asserted secular purpose is a sham.[18] The absence of historical support about the Ten Commandments' central role thus is relevant both to the displays' purposes and their effect; it further undercuts the Counties' claims in context.

Petitioners now seek to distance themselves from the displays' exaggerations. Where the displays assert that the Ten Commandments provide *the* moral background of the Declaration of Independence, the petitioners now say that some of the Commandments "are compatible with" the Declaration's unalienable rights. Pet. Br. at 10 n.7. Where

[18] The Counties also chose to capitalize the word "Lord" four times (and no other word), thus emphasizing the religious aspects of the Ten Commandments. [*See* Pet. App. at 189a.] By visually highlighting religious over secular terms, the displays undercut any claim to commemorate the Ten Commandments' foundational secular influence.

the displays assert that the Ten Commandments provide the foundation of our legal tradition, the petitioners now say that the Counties' factual claims "need not be accurate." *Id.* at 10.

The United States similarly seeks to avoid any scrutiny of the displays' accuracy, *see* U.S. Br. at 17-24, saying that a display's "uncommonly silly" or "disunified" content does not establish religion, *id.* at 21 n.11, and that a "thematically disjointed" or "muddle[d]" display may be lawful. *Id.* at 29.[19] True enough. But review of a display's factual accuracy (or even plausibility) is essential to discern whether government has a sincere or sham purpose for displaying *religious* text. Otherwise, no display would be subject to judicial scrutiny; *Santa Fe*'s "duty" would be illusory. It is the *petitioners*, after all, who assert a common link connecting the displays' elements. And it is the *petitioners* who assert that the common link provides a secular reason to include the Ten Commandments. Courts cannot gauge sincerity of purpose if those assertions are insulated from review. *See Aguillard*, 482 U.S. at 586-89 (to gauge whether purported secular purpose of enhancing academic freedom was sincere, Court evaluated effect of

[19] The Counties' displays are "uncommonly silly" in ways unrelated to the Ten Commandments. They assert that "The Star-Spangled Banner" "became a rallying cry for the American Patriots during the Revolutionary War," even though Francis Scott Key wrote the song three decades later. [Pet. App. 181a-182a.] And they assert that items (erroneously described as documents) celebrating America – a picture (of Lady Justice) and a song ("The Star Spangled Banner") – somehow "played a significant role in the *foundation* of our system of law and government." [Pet. App. 179a (emphasis added).] The point is not to quibble with details; rather, the displays' sloppiness undermines its purported secular intent to "educate," suggesting that the display was hastily assembled in an effort to once more place the Ten Commandments on the courthouse walls.

statute requiring teaching of creation science along with teaching of evolution); *Santa Fe*, 530 U.S. at 315.

The displays' factual assertions about the Ten Commandments' "profound influence" on Western legal thought and America's formation, and their provision of the "moral background" for the Declaration of Independence, are demonstrably false. Scholars have concluded that these assertions do not survive careful scrutiny – that there is no basis for singling out the Ten Commandments' influence on Western legal thought or linking it to the Declaration of Independence. *See* Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & Religion 525 (2000) (*Green*); *Finkelman*. On the contrary, the historical record reveals that: the influences on early American law are largely secular; any early religious influences declined during the nation's founding; the American government's central founding documents have nothing to do with the Commandments; and, to the extent that the Ten Commandments' non-religious precepts are consistent with current law, those precepts are universal (and even predate the Ten Commandments).

American law derives from broad and varied sources, including: the common and statutory law of England; English equity, chancery, ecclesiastical and other non-common law courts; Roman, continental European and Germanic tribal law. *See Green* at 536-37; *Finkelman* at 26; Lawrence M. Friedman, *A History of American Law*, 2d ed. 33-104 (1985); Richard B. Morris, *Studies in the History of American Law*, 2d ed. (1974); Michael Hoeflich, "Relationships Among Roman Law, Common Law, and Modern Civil Law: Roman Law in American Legal Culture," 66 Tulane R. Rev. 1723 (1992). "[E]arly American law was an amalgam of British common law, legal reform impulses, and practical responses to the frontier situation facing the settlers." *Green* at 537.

Many deem the Magna Carta to be the earliest source of modern English and American law. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution*, 22-54 (1967). It and the 1689 English Bill of Rights influenced the American colonialists enormously. *Finkelman* at 26. The Magna Carta, written in 1215, contained core due process principles. The English Bill of Rights subjected the Crown to the laws of Parliament and established British citizens' rights to freedom of speech and jury trial, and freedom from cruel and unusual punishment or excessive fines and bail.[20] Neither the Magna Carta nor the English Bill of Rights mentions the Ten Commandments, nor any individual Commandment. Other than formalistic references to "God," bearing no relation to the documents' substantive provisions, neither document mentions religious principles. *See*, *generally*, Neil H. Cogan, ed., *Contexts of the Constitution* 657-66, 686-92 (1999).

The secular writings of Enlightenment thinkers such as John Locke, author of *Second Treatise on Government* (1690), John Trenchard and Thomas Gordon, the authors of *Cato's Letters* (1720-23), and other English libertarian thinkers also heavily influenced the framers. *Finkelman* at 26. Indeed, "[t]he influence of Locke and other Enlightenment thinkers on late colonial attitudes toward the law

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[20] The concessions granted by King John in the Magna Carta largely applied only to the baronial families atop the feudal system. *Finkelman* at 27. In the early seventeenth century, Sir Edward Coke successfully argued for their expansion to all British people, leading ultimately to the 1689 English Bill of Rights. "When American colonists spoke of their 'rights as Englishmen,' . . . they had in mind, among other things, the rights and privileges found in the Magna Carta . . . ," *id.* at 28, and later "the protections set out in the English Bill of Rights . . ." *Id.*

cannot be overstated." *Green* at 545. Thus, "[w]hile English law had some Biblical roots, by the time of the American settlement . . . the Bible and religious issues had long been surpassed by more practical concerns, especially in the American colonies." *Id.* at 26.

The Bible was one of many sources influencing the development of early colonial law, particularly in the four New England colonies of Plymouth, Massachusetts Bay, Connecticut and New Haven, and particularly between 1620 and the 1680s. *Finkelman* at 30; *Green* at 537. *See* Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660*, 4-15 (1983) (*Chapin*); George Lee Haskins, *Law and Authority in Early Massachusetts*, 136-37, 141-162 (1960). Even there, however, the Bible as a whole, not the Ten Commandments themselves, influenced colonial law. *Haskins*, at 136-37.

By contrast, Rhode Island – which Roger Williams founded after his exile from Massachusetts Bay, in part because he refused to accept the religious aspects of the colony's legal culture – explicitly rejected Bible-based codes. *Green* at 542; *Finkelman* at 30. And Biblical influence was far less in the non-Puritan colonies. Virginia, the oldest and most important British colony, quickly ended an effort at a Decalogue-based system and resorted to common law. *Green* at 542; *see* Perry Miller, "Religion and Society in the Early Literature of Virginia," in Perry Miller, *Errand into the Wilderness* 99-140 (1956); *Chapin* at 4-15; Arthur P. Scott, *Criminal Law in Colonial Virginia* 3-38 (1930). Pennsylvania and New York applied secular common law. *Green* at 542. Indeed, "both Puritans and non-Puritans alike viewed their biblically based legal codes as distinct from, and at times in tension with, the secular common law." *Green* at 537 (citing *Chapin* at 4-15; Rosezella Canty-Letsome, *John Winthrop's Concept of Law*

in 17th Century New England, One Notion of Puritan Thinking, 16 Duquesne L. Rev. 331, 350-51 (1977-78); *see also Green* at 542 ("the New England codes, with their express reliance on the Pentateuch and Decalogue, were viewed as alternatives to the common law").

Ultimately, then, the vast majority of colonial law (and their English sources) developed apart from the Ten Commandments. Only a small portion of colonial laws, such as the Puritan Codes, derived from the Bible generally, and an even smaller portion directly paralleled the Ten Commandments.[21] And the Puritan colonies' experiences – including Massachusetts Bay's Salem Witch trials – had illustrated the dangers of a religion-based legal system. *Finkelman* at 35. As a result, then, many of the core protections in our Bill of Rights, including freedom of religion, reflect a reaction to the excesses of the Puritan Codes, not an endorsement of them. *Id.*; *see generally, Green* at 537, 542-43.

Religious influences diminished further during the founding era. A "developing market economy, dependent on trade with England and between the colonies, required a more formalized legal system," with consistent rules based on British common law. *Green* at 543 (citing Kermit L. Hall, *The Magic Mirror: Law in American History* 22-23 (1989); Morris, *Studies in the History of American Law* at 62-64; Friedman, *History of American Law* at 48-49, 80). The founders did not see law as biblically-based, but as "a repository of human experience, embodying concepts of justice, equity, and the rule of law, not as representing

[21] Even in Massachusetts, biblical law diminished in influence well before the Revolution. After 1691, the laws of the colony, and later the state, "were essentially secular, based primarily on English law, indigenous law, and local custom. *Finkelman* at 30.

divine principles." *Green* at 545. American revolutionaries cited the Magna Carta and secular authorities such as William Blackstone's *Commentaries on the Laws of England* in their struggles. Blackstone's *Commentaries*, written in the 1760s, contain no reference to the Ten Commandments (although they do refer to "God"); instead, the legal system he described is secular.

The framers widely read and were deeply influenced by Enlightenment thinkers. *Green* at 544; *Finkelman* at 26; *see* Bailyn, *Ideological Origins* at 35-54; Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 291-305 (1969). Historians and scholars deem these sources to be ideologically central to the nation's founding, highly influential on the legal and political documents of the founding era, including the Declaration of Independence, the United States Constitution and the American Bill of Rights. *See* Bailyn, at 22-54. The Declaration contains formalistic prefatory references to the "Laws of Nature and of Nature's God," and to a "Creator." *See Finkelman* at 36. The Constitution and Bill of Rights do not even contain these references. But beyond those formalistic references, none of these documents pertains to biblical law or the Ten Commandments. Rather than relying on divine authority, the Constitution is "ordained" by "the People of the United States." *See id.* at 36-37. "The foundation of the law of the United States thus emanates from the nature of representative government – what Jefferson called 'the consent of the governed' – and needs no external or divine authority for its support." *Finkelman* at 37-38; *see generally* Isaac Kramnick and R. Laurence Moore, *The Godless Constitution* 26-45 (1996).

In light of this, it is no surprise that neither the Ten Commandments nor biblical law get mentioned anywhere

in the debates and publications surrounding the founding documents. The wide-ranging debates were reprinted in Madison's *Notes*, the *Annals of Congress*, Farrand's *Records*, Elliot's *Debates*, and elsewhere. In those debates, the founders mentioned Roman, Continental and British law, among others, but – so far as researchers have yet determined – no delegate ever mentioned the Ten Commandments and no delegate ever mentioned the Bible. *Finkelman* at 40. Indeed, the only serious discussion of religion led to the Constitutional provision barring religious tests for office-holding. *Id.* Nor do the Founders' papers contain any statements about the Ten Commandments' legal significance. *Green* at 548 (citing Philip B. Kurland and Ralph Lerner, eds., *The Founders Constitution* (1987)).[22] Moreover, *The Federalist Papers* do not contain any mention of the Bible or the Ten Commandments.

Simply put, the historical record makes clear that the American government was not based on the Ten Commandments and was not "profoundly influenced" by them.[23] Nor does the record contain any hint that the Ten Commandments influenced, or served as the "moral background" for, the Declaration of Independence. As one *amicus* notes, the National Archives' website, "which

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[22] Indeed, a computer search of George Washington's collected papers found no reference to the Ten Commandments. *Green* at 548 n.87 (citing source).

[23] This is not to say that the secular principles contained in the Ten Commandments or other ancient moral codes did not "inform our notions of right and wrong" and thus affect the development of law. *Green* at 525. Of course they did. But influence at that abstract level is far different from the specific assertions contained in the Counties' displays.

describes in great scholarly detail the background, content, and impact of the Charters of Freedom," identifies the foundation of the Declaration of Independence as the "predominantly secular philosophy of the Enlightenment." Brief of Freedom from Religion Foundation as *Amicus Curiae* at 15-16.

Petitioners say only three things to support the displays' historical claims. First, they list colonial laws that reflected or were influenced by the Ten Commandments. *See* Pet. Br. at 22-27. Second, they cite judges and commentators who, in turn, say that the Ten Commandments influenced American law. *Id.* at 11 n.8, 21-22. Third, they cite modern laws that parallel some of the Ten Commandments. *Id.* at 26-27.

None of these will suffice to rebut the actual historical record cited above and detailed in *amici* briefs. As for the colonial laws: To be sure, some colonies enacted Biblical codes – but most did not. Those that did generally tracked broader Biblical principles, not the Ten Commandments. And, in any event, the colonial experiment in Bible-based laws ended before the Revolution and is not reflected in American law.

As for judges and commentators: The cited statements largely build on one another but, traced back to their roots, do not rely on history. *See* Brief of Council for Secular Humanism, et al., as *Amici Curiae* at 9-10. And, as detailed above, history does not support those judicial statements, however well-intentioned they are or intuitive they may seem. After all, "no amount of repetition of historical errors in judicial opinions can make the errors

true." *Wallace*, 472 U.S. at 107 (C.J., Rehnquist, dissenting).[24]

As for parallels between American law and the Ten Commandments: To begin with, the text of the Ten Commandments bears little relation to American law. The first four are religious commands; they could not be part of American law, consistent with the First Amendment. Three others – prohibiting coveting and adultery and requiring that one honor one's parents – generally are not part of American law. The remaining three – prohibiting killing, stealing and perjury – are part of American law, to be sure, but they were common to ancient religious and secular moral codes. They are hardly unique to the Ten Commandments. *See Green* at 525.

The Code of Hammurabi, the earliest compilation of Babylonian law (*circa* 2200 B.C.E.), predated Mosaic law by 1000 years. *The Hammurabi Code* (trans. Chilperic Edwards) (1904), p. 120. Indeed, the Ten Commandments derived from the Code of Hammurabi and two dozen passages in Exodus are substantially identical to sections in the Code of Hammurabi. *Id.* at 123-30. Like the Ten Commandments, the Code of Hammurabi prohibited killing, adultery, stealing, and bearing false witness. *Id.* at 3, 6, 8, 21-22, 129, 153, 206-07, 209-10, 259-60.

Other ancient codes similarly prohibited such things as murder, theft, adultery and perjury. *See The Hittite Laws* (E. Neufeld trans.) (1951) [Cuneiform fragments of Hittite laws written *circa* 1370 B.C.E. prohibit homicide, theft and adultery]; Albert Kocourek & John H. Wigmore,

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[24] Much of the United States' first argument thus rests on unexamined and ultimately flawed history. *See* U.S. Br. at 7-10 (reciting judicial statements about history).

Source of Ancient and Primitive Law 469-99 (1915) [the Laws of Manu (Hindu), created *circa* 1100 B.C.E., prohibited murder, adultery, theft and perjury]; Ilias Arnaoutoglou, *Ancient Greek Laws: A Sourcebook* 22-23, 70-73 (1998) [Athenian law of the 6th Century B.C.E. prohibited adultery, theft, murder and other forms of homicide]; 1 *The Civil Law* 57-77 (S.P. Scot trans.) (1932), 11 *The Civil Law* 29-46 [Roman law prohibited murder, theft, perjury and adultery]; A.F.P. Hails, *Remnants of Ch'in Law* 120-131, 138-40, 146-49, 168-69 (1985) [Ch'in Dynasty, *circa* 7th Century B.C.E., prohibited theft, falsely denouncing someone as a criminal, killing without authorization and adultery]. Nor is it surprising that many moral codes, including those predating the Ten Commandments, contain similar secular rules, because basic prohibitions on murder and stealing are essential elements of any social structure.

Moreover, the displays themselves offer no evidence to support the facially suspect link between the Ten Commandments and Declaration of Independence. The Ten Commandments describe individuals' duties to a deity and, as commanded by that deity, to each other. The Declaration of Independence describes the relationship between individuals and government. Other than the mention of a Creator, no link is apparent and none is described by the displays. What is left is the bald assertion that core religious beliefs "clearly" influenced the Declaration of Independence and "provide[d] the moral background" for it. [Pet. App. at 180a.][25]

[25] The United States chastises the Sixth Circuit for its "insistence on elaborate exegesis." U.S. Br. at 20. But that misses the point. The displays assert a link between the Ten Commandments and Declaration of Independence – indeed, the Declaration's moral debt to the

(Continued on following page)

But history demonstrates that American law is not rooted in the Ten Commandments. And "when issues concern the relationship between church and state, history matters." *Green* at 530-31. American states inherited their prohibitions on murder, theft, perjury and defamation from English law, the earliest surviving sources of which date from the seventh century. *See* Brief of Baptist Joint Committee et al., as *Amici Curiae* in *Van Orden* (BJC *Van Orden* Br.), at 20-21. Those sources, in turn, compiled customs that "had existed among the Germanic tribes before they were written down and before the Anglo-Saxons were Christianized." *Id.* at 21 (footnote omitted). The Ten Commandments are not mentioned *at all* in the standard comprehensive English historical sources. *Id.* at 21-22. They are not mentioned *at all* in this nation's founding documents. They are not mentioned *at all* in the Constitutional debates. "In sum, only three of the Commandments are a significant part of American law, and those three provisions were part of the law of England before England learned of the Commandments." *Id.* at 23.

Finally, even if the historical record were less settled – that is, even if serious scholarly research supported both sides of the argument – the Counties' displays would not serve a secular "educational" purpose. Rather, they would serve the impermissible purpose of "taking sides in a religious controversy." BJC *McCreary* Br. at 9. If the historical record is unclear, the role and influence of the Ten Commandments is debatable. But it is not a debate the government can enter without straying from its

Commandments – that is not apparent from the face of either document (and not supported by historians). Absent more – that is, absent some supporting authority – the Counties effectively ask the reasonable observer to take the link "on faith." *See* BJC Br. in *McCreary* at 8-9, 11.

proper, religiously neutral, role. In the absence of clear, objective, historical evidence about religious history or religion's role in secular events, the Counties' proclamation that the Ten Commandments "profoundly influenced" Western legal thought and the formation of our country, and that the Commandments "provide[d] the moral background" of the Declaration of Independence and the "foundation" of our legal history [Pet. App. 180a], is simply a subjective assessment about the importance of a particular religious faith. Government serves no secular purpose by making that assessment.

c. Social facts.

The district court was uniquely positioned to assess social facts, especially at the preliminary injunction stage. It was best able to gauge the petitioners' ever-changing displays and ever-shifting legal rationales. From its chambers in rural southeastern Kentucky, it was most familiar with the tone and content of public discourse. It could read letters to local newspapers, see the proliferation of "Keep The Ten Commandments" yard signs and hear the statements of public officials. These cases were front-page news. The district court was thus best suited to gauge whether, in light of these factors, the litigation history and the displays' content, the Counties "nevertheles[s] ask[ed it] to pretend that [it] d[id] not recognize what every [one else] understood clearly – that this [display was] about [posting the Ten Commandments]." *Santa Fe*, 530 U.S. at 315.

The petitioners passionately want to display the Ten Commandments at the seat of county government precisely because of their religious content and meaning. They candidly expressed their passion earlier in this litigation. But their candor thwarted them from desired

ends. They have strategically elected to mute their passion; they now seek to justify the display despite its religious significance, rather than because of it. But justifying governmental display of core religious text as secular disserves both religion and government. "By attributing to the Commandments a legal significance they do not have," the Counties "inflat[e] the importance of the Commandments to" non-Jews and non-Christians. BJC *Van Orden* Br. at 23. "But by emphasizing this false source of significance," the Counties "necessarily distor[t] and concea[l] the Commandments' true significance in the faiths to which they are sacred." *Id.* The Counties thus manage "both to advance and inhibit religion at the same time – to advance one understanding of the sacred text, and thereby to inhibit another, more religious understanding of that text." *Id.*

There simply is no more secular purpose for the Counties' third displays than existed in *Stone*. Here, as there, the government's true purpose is to impermissibly advance religion.

2. Because the displays rest on the fundamentally flawed – and ultimately sectarian – premise that the Ten Commandments were a "foundational document" for this nation's governmental structure, and because a reasonable observer would understand that the Counties' changing displays were strategic litigation responses, the displays had the effect of endorsing religion.

Government action that has the effect of endorsing religion likewise violates the Establishment Clause. *See*

Allegheny, 492 U.S. at 592. At issue is whether the "objective observer, acquainted with the text, legislative history and implementation of the [action], would perceive it as a state endorsement" of religion. *Wallace*, 472 U.S. at 38 (Justice O'Connor, concurring); *Allegheny*, 492 U.S. at 593. The endorsement test thus ensures "that government . . . not . . . conve[y] a message that religion or a particular religious belief is favored or preferred." *Id.* at 627 (O'Connor, J., concurring in part and concurring in the judgment). Here, the content, context and location of the Counties' displays reveal endorsement.

As detailed above, the content of the displays expresses a subjective view of the influence of a particular religious text on American law and government. It is not an objective statement of verifiable fact. It is not a statement supported by history. It is not a statement evident from the face of the displayed documents. And it is not a statement supported by evidence at the site. Section II.B.1.b detailed why the Counties' unsupported proclamation about the Ten Commandments' foundational role had the impermissible purpose of endorsing religion. For similar reasons, the displays have the impermissible effect of endorsing religion.

The reasonable observer will be familiar with the Counties' repeated efforts to post the Ten Commandments. That observer also will be familiar with the Counties' earlier announced purpose of demonstrating "America's Christian heritage." [Pet. App. 127a, 151a.] The reasonable observer will know that the Counties deemed current law to hold "that America is a 'Christian nation.'" [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (citing *Church of the Holy Trinity*, 143 U.S. at 471)] The observer will know that the Counties proclaimed the Ten Commandments as "*the* precedent

legal code of the Commonwealth" and "*the* central historic legal document of the state . . ." [J.A. 1 #5 at 8-9, 28 #6 at 8-9 (emphasis added)], and erected displays highlighting the religious nature of the Ten Commandments. Finally, the reasonable observer will know that the Counties now have declared the Ten Commandments to be "*the* foundation of our legal tradition," providing "*the* moral background of the Declaration of Independence," even though there is no historical support for those assertions.

The displays' context also has the effect of endorsing religion. The displays contained, in addition to the Ten Commandments, the text of American (or earlier Colonial or English) political documents and patriotic song lyrics and a picture of Lady Justice. To the reasonable observer, the displays thus equated core religious beliefs with America's political heritage, patriotism and liberty. As the courts below correctly concluded: "The reasonable observer will . . . understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement." [Pet. App. at 45a.] *See Adland*, 307 F.3d 486-87 (linking Ten Commandments with symbols of American secular heritage "serves to heighten the appearance of government endorsement of religion"); *see also Books*, 235 F.3d at 307 ("placement of the American Eagle gripping the national colors at the top of the [Ten Commandments] monument hardly detracts from the message of endorsement; rather it specifically links religion . . . and civil government").

Nor is this display analogous to the holiday display cases. There, this Court assessed whether the inclusion of religious symbols in holiday displays impermissibly endorsed religion. In *Lynch*, this Court upheld a Christmas display containing a crèche among many purely

secular symbols, such as a Santa Claus house, lighted tree and candy-striped poles. *Id.*, 465 U.S. at 571. In *Allegheny*, by contrast, the Court struck down a display in which the crèche stood alone in a prime courthouse location. *Id.*, 492 U.S. at 598-99. But the Court also upheld a display including a menorah along with a Christmas tree and a sign saluting liberty. *Id.*, 492 U.S. at 614.

Lynch and *Allegheny* require tough line-drawing that has divided this Court. But those displays all involved symbols *related to one another and the seasonal holidays*; they did not include just secular and religious symbols. The crèche decisions and the principles that govern them have this in common: they address secular and religious symbols of Christmas in Christmas displays at Christmas time. And the "salute to liberty" decision involved the display of symbols related to different religions' December holidays and a sign seeming to celebrate pluralism. The cases cannot be understood to approve governmental display of a crèche in a non-Christmas setting, even if surrounded by secular symbols – for example, a Labor Day display celebrating workers.

By contrast, the Counties' displays are more like the Labor Day example – made permanent. As detailed above, the Ten Commandments are not related to the political and patriotic documents comprising the rest of the display. They did not "profoundly influence" or provide the "moral background" for our nation's founding documents. And they are not "the precedent legal code of the Commonwealth" or "the central historic legal document of the state." The Commandments indeed "stick out [of this display] . . . like a proverbial sore thumb." [Pet. App. 47a (citation omitted).][28]

[28] The United States' reliance on *Lynch* and *Allegheny* hinges, of course, on the accuracy of the displays' historical assertions. *See* U.S. Br. at 12-14. Because, as argued in § II.B.2.b, above, the Ten Commandments did not "profoundly influence" or serve as the "moral background" for our nation's founding documents, the displays are not simple "acknowledgements" of religious roots and are not analogous to Christmas displays. Moreover, even if the historical record is unclear, that lack of clarity undermines the United States' position, because the Counties are expressing their view about the disputed influence of one religious text. By contrast, there was no dispute in *Lynch* or *Allegheny* about the religious roots of Christmas.

(Continued on following page)

The displays' location also has the effect of endorsing religion. The Counties' courthouses are the seats of all three branches of county government. Citizens, including the individual respondents, pay taxes at the courthouse, renew licenses and automobile tags there, and engage in other routine civic business, including voting and jury service. That is undoubtedly why the McCreary County Fiscal Court ordered that "the display be posted in a very high traffic area of the courthouse." [Pet. App. 121a.] And it is why this Court has recognized that displays do not exist at the seat of government – a location so obviously under government control – without governmental approval. *See Allegheny*, 492 U.S. at 599-600.

Finally, last Term, in *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004), Justice O'Connor identified four factors that channel the endorsement analysis: history and ubiquity; absence of worship or prayer; absence of reference to particular religion; and minimal religious content. *Id.*, 124 S.Ct. at 2323-26 (O'Connor, J., concurring). These factors point toward endorsement here.

First, governmental Ten Commandments displays are relatively new and far less ubiquitous than the Pledge of Allegiance or national motto. *See* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extreme But Missing the Liberty*, 118

Harv. L. Rev. 155, 236 (2004) ("there is no long and ubiquitous history of large monuments displaying the text of the Commandments . . ."). More to the point, there is *no* history of displaying the Ten Commandments *as a foundational document* for our nation's political and legal history and the Counties' displays are not ubiquitous. On the contrary, the Counties erected these displays in the course of litigation and any reasonable observer will understand that they are a strategic litigation response.[27]

Second, while the Ten Commandments are not worship or prayer in themselves, they have as their "purpose placing the [reader] in a penitent state of mind, or [are] intended to create a spiritual communion or invoke divine aid, [thus] stray[ing] from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history." *Newdow*, 124 S.Ct. at 2324 (O'Connor, J., concurring). Indeed, this Court found this precise effect – "to read, meditate upon, perhaps to venerate and obey, the Commandments" – in *Stone*. *Id.*, 449 U.S. at 42.

Third, the Ten Commandments displays repeatedly refer to particular religions, as detailed in § I.B, by championing that document itself and by choosing text that reflects deep theological and historical rifts. Declaring the Ten Commandments to be the foundational document for our nation and the moral background of the Declaration of Independence necessarily favors those religions that revere the Ten Commandments. And because there is no generic, generally accepted text, choosing this version of

[27] The United States thus makes far too general a point when it describes "official acknowledgements" of religion's role in our history. *See* U.S. Br. at 10-12. These displays do not acknowledge religion's role generally, but specifically assert the Ten Commandments' "foundational role" – a role that history does not support.

the Ten Commandments necessarily favors some Protestants over Catholics, Jews and other Protestants. "[N]o religious acknowledgement could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another." *Newdow*, 124 S.Ct. at 2326 (O'Connor, J., concurring).

Fourth, the Counties' displays have far more than "minimal" religious content. The displays contain fourteen to seventeen Biblical verses (depending on religions' numbering and organizing systems). They recite *the* central Jewish article of faith. They recite core religious beliefs of Christians and Jews. They capitalize the word "Lord" in every usage. They could not be more of a religious proclamation, as the reasonable observer surely knows.

CONCLUSION

In *Allegheny*, Justice Stevens suggested that the frieze depicting Moses holding symbolic Ten Commandments would be constitutional because dozens of other "great lawgivers" are depicted. *Id.*, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part). But the Counties' courthouse displays are not displays of "lawgivers." They are not a sampling of great moral codes. The only other "codes" are those establishing the political framework of our republic. Nor do the Counties expose citizens to the teachings of the world's great cultures and religions, for they display only one Protestant version of the Ten Commandments.

McCreary and Pulaski counties have each posted three different Ten Commandments displays in their courthouses. They initially trumpeted their celebration of Christianity and highlighted the religious components of their displays. They repeatedly have sought to link the Ten Commandments to the formation of America, calling them

the precedent legal code, *the* central historic legal document of the state, *the* foundation of our legal tradition, and as providing *the* moral background of the Declaration of Independence. The purpose and effect of the Counties' actions throughout this litigation, including in posting their third displays, clearly has been to advance religion. For this reason, the third displays violate the First Amendment's Establishment Clause and this Court should affirm the Sixth Circuit's judgment.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 21 2005
OFFICE OF THE CLERK

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No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal-sized frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government, where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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STATEMENT OF THE CASE

Respondents misrepresent the facts of this case. Their errors include the omission of relevant facts, "facts" that no longer exist, and the creation of "facts" that never existed.

Relevant Facts That Were Ignored: The Courthouses are like museums. Pet. Br. 4. In McCreary, not counting the Foundations Display, there are 284 additional framed historical documents that adorn (some might think clutter) the walls, so that there is little remaining space. *See* Am. Liberties Inst., Br. 2-28, *McCreary County v. ACLU*, No. 03-1693. Some frames include a Veterans Day gift, a recently donated flag that flew ~~in~~ Afghanistan, a plaque honoring a local Medal of Honor winner, pictures of the courthouse staff from the early 1900s, a Kentucky Governor from the county, other civil servants, the naming of a memorial road, the original 1912 courthouse and the rebuilt courthouse following the 1930 and 1950 fires. *Id.* at 2, 5-13. Documents commemorate President Roosevelt and Social Security, the surrender of Germany and Japan, the Civil War, Desert Storm, and American history. A complete list would consume this brief.

As part of its 200th anniversary in 1999, Pulaski added numerous documents. A visitor is introduced to Casimir Pulaski, who joined the Revolution because he "opposed tyranny," *id.* at A1, sees past courthouses, plaques regarding Civil War battles, early modes of travel, local artists and playwrights, two Governors and a U.S. Senator and Representative from the county, a Medal of Honor winner, the meaning of the county name, the origins of Kentucky's largest lake, and a history of local government. *Id.* at A1-10. The walls depict an array of events regarding the history of the counties, the state and the Nation. *Id.* at A12-22.

Alleged "Facts" That No Longer Exist: Respondents focus

on the first displays, but admit that Petitioners "voluntarily granted the plaintiffs relief from those displays." JA 3, #10 at 2; 29, #11 at 2. They then focus on the second displays, but acknowledge that Petitioners do not "quarrel with the conclusion that the second displays violated the Establishment Clause," that they "make no effort to defend those displays," and "they strive to distance themselves from their earlier displays." Resp. Br. 23-24. Respondents are right that "[n]o one here argues that those displays were constitutional." *Id.* But they attempt for the first time in this litigation to pin a resolution regarding the second display on the Foundations Display.[1] Petitioners voluntarily accepted the preliminary ruling on the second display. That display, and any resolution regarding it, is dead, buried and abandoned. That order is final. Petitioners closed that chapter.

Alleged "Facts" That Never Existed: There are many alleged "facts" in Respondents' brief that have no basis, but only a few will be cited here due to space limitations.[2] The contention that the "sole legislative authorization" for the Foundations Display is a 1999 resolution regarding the second display is wrong. Resp. Br. 4. There was no resolution for the first display and none for the Foundations Display because none was needed. Resolutions are not necessary to post documents. The resolution on the second display was for that display only. When it was enjoined and not appealed, that display and its resolution were placed in the same tomb.

Petitioners did not "capitalize the word 'Lord'" in the Decalogue. Resp. Br. 30 n.18. They did not create the

[1] Respondents never referred to a resolution on the second display. There is no mention of it during the March 2001hearing on the Foundations Display (JA 19, #71), nor in any pleading or in the lowers courts.

[2] Many relate to the prior displays which are not before this Court.

Displays. English translations capitalize this Hebrew word. In the Magna Carta several words are also capitalized, including "God," but that is because capitalization appears in the original document. PA 199a, 200a, 210a, 212a.[3] Finally, there is no evidence regarding the "tone and content of public discourse," "letters to local newspapers," "proliferation of 'Keep the Ten Commandments' yard signs," or "statements of public officials," (Resp. Br. 42), nor did the District Court ever refer to such alleged information.

ARGUMENT

I. THE FOUNDATIONS DISPLAY WITH THE TEN COMMANDMENTS PASSES THE *LEMON* TEST.

The Sixth Circuit's "theory of indelible, unconstitutional taint not only offends common sense" (PA 83a, 41-42a), it is contrary to *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), as applied to courthouses, where the Decalogue is a widely recognized symbol of law. Such a twisted emanation of *Lemon* is unworkable, contrary to precedent, and unsound, especially where public officials unversed in this Court's divided opinions are tasked with managing business while navigating the shoals of the Establishment Clause.

A. The Display Satisfies The Purpose Prong.

The purpose prong accords great "deference" to any

[3] Whether the Display was hastily assembled as Respondents claim is unknown. Resp. Br. 31 n.19. The Foundations Display in each Courthouse was donated. Petitioners did not create them.

"articulation of a secular purpose" unless it is a fraud, a hoax, or an intentional deception, i.e., a sham. Pet. Br. 8-9. In most cases, this Court has "effortlessly discovered a secular purpose."[4] The five cases decided under the purpose prong all involved public schools,[5] where this Court has applied scrutiny at a level inversely related to the age of the students, noting that adults are "presumably not readily susceptible to 'religious indoctrination,' or peer pressure."[6] This Court has never struck down a governmental practice involving *adults* under the purpose prong. To do so here regarding a Display about law, in Courthouses with a museum-like setting, where adults rather than juveniles are present, would require an extreme *extension* of *Lemon*. The Sixth Circuit did just that by deciding this case solely under the purpose prong. If there is no agreement on anything else, there must be consensus to reverse this *unprecedented* application of *Lemon*.

Although there is no controlling authority on whether courthouses can display the Decalogue, the District Court characterized the mere posting of the first display as "defiance [that] imprinted [Petitioners'] purpose, from the beginning, with an unconstitutional taint." PA 41a. The Sixth Circuit erroneously stated that such finding was consistent with this Court's precedent. *Id.* "A finding of religious purpose is

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[4] *Edwards v. Aguillard*, 482 U.S. 578, 613 (1987)(Scalia, J., dissenting). "[I]t is entirely proper to presume that [public] officials will act in good faith." *Mitchell v. Helms*, 530 U.S. 793, 863-64 (2000)(O'Connor, J., concurring).

[5] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards*, 482 U.S. at 578; *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[6] *Marsh v Chambers*, 463 U.S. 783, 792 (1983)(citation omitted); *see also Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981); *Edwards*, 482 U.S. at 584 n.5.

militated by the blatantly religious content of the displays. The displays do not present a 'passive symbol' of religion like a creche... . Instead, the Ten Commandments are an active symbol of religion ... ." *Id.* at 35a. The court ignored *Lynch v. Donnelly*, 465 U.S. 668 (1984), and overlooked *Allegheny*, where the menorah celebrates a "miracle," and the Talmud prescribes the lamp lighting ceremony as "a religious deed or commandment." 492 U.S. at 583-84. Yet, it was deemed a passive symbol. Pet. Br. 12 n.9. That one passive symbol of law should "taint" future actions or convert a secular display into a religious one is absurd. The "theory of indelible, unconstitutional taint" would have doomed the menorah in *Allegheny*, but "not one Justice took the position that the officials' miscalculation regarding the [creche at] the Grand Staircase tainted the decision concerning the [menorah at] the City-County Building." *ACLU v. Schundler*, 168 F.3d 92, 105 n.12 (3d Cir. 1999)(permitting modification of a display). Moreover, unlike the infrequent and gratuitous appearances of creches and menorahs on public property, the universally recognized symbol of law is at home in a courthouse. The Decalogue is unlike almost any other acknowledgment. When displayed in a courthouse, it is not a religious statement any more than is the National Motto on our currency. While this Court has ornate carvings, the Courthouses have inexpensive, framed documents. Although on different scales of economy, the two settings are functionally equivalent.

The first display was a single copy of the Decalogue placed in the midst of a few hundred existing documents. When sued, Petitioners were given a second display. The legal advice they received was that they should switch rather than fight. Admittedly, this advice was questionable, but arguably understandable in light of no clear legal guidance. When the second display was enjoined, Petitioners did not

challenge the ruling. The Foundations Display was then donated. Petitioners terminated their counsel and sought new counsel. This Display was also enjoined when the District Court created a "one strike, you're out" rule. The first display would be what Justice Stevens described as "equivocal," the second as having an impermissible focus on religion, and the Foundations Display as showing respect for law. *See County of Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part, dissenting in part). Petitioners stepped on a landmine with the second display, but surely they must be allowed to correct their steps, especially considering the state of the law.

As did the lower courts, Respondents focus exclusively on the Decalogue. Yet, *Lynch* and *Allegheny* inform us that the *entire* context matters. Respondents concede that "all but one of these documents are perfectly legitimate and serve a perfectly valid secular function." JA 19, #71 at 18. They say "[t]here is absolutely nothing wrong with posting every one of these documents, but for the one religious document." *Id.* They argue that these "perfectly legitimate" documents do not "sufficiently secularize the Ten Commandments." JA 10, #36 at 58. The question is not whether the other documents secularize the Decalogue. They do not, any more than the Decalogue makes the Declaration sacred. The real question is the purpose of the *entire* Display. The Foundations Document answers this question, stating the "display contains documents that played a significant role in the foundation of our system of law and government." PA 179a. The undisputed testimony stated the Display "is educational in nature, and is intended to reflect a sampling of documents that played a significant role in the development of the legal and governmental system of the United States." JA 57, 62; Pet. Cert. 23 n.9.

Respondents said that while there is no "direct line" to the Declaration and political life, the Decalogue "may have had

an influence, ... a big influence." JA 19, #71 at 20. Respondents and their amici admit that some Colonial laws "directly paralleled the Ten Commandments" (Resp. Br. 35), and that at least the Commandments regarding murder, theft and perjury are a significant part of American law.[7] Their amici admit it "is equally indisputable that the precepts contained in some of the Commandments have been inspirational in the development of the Western legal tradition." Legal Historians, Br. 2-3. Professor Green, who authored the Legal Historians' brief, stated elsewhere: "It is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition... . Few people, if any, would dispute that the Ten Commandments ... inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is part."[8] That the "Ten

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[7] Resp. Br. 41; *see also* Baptist Joint Comm., Br. 16, *McCreary*, No. 03-1693; Baptist Joint Comm., Br. 20, *Van Orden v. Perry*, No. 03-1500; Legal Historians, Br. 3, *McCreary*, No. 03-1693; Council for Sec. Humanism, Br. 19, *McCreary*, No. 03-1693 (some colonies incorporated "portions of the Decalogue"). William Blackstone said that with respect to crimes like murder, theft, and perjury, the legislature "acts only ... in subordination to the great lawgiver, transcribing and publishing his precepts." 1 *Commentaries on the Laws of England* 54 (1765). Respondents and their amici ignore the influence of the Sabbath command on Sunday laws, which "were motivated by religious forces" derived from the Decalogue. *McGowan v. Maryland*, 366 U.S. 420, 431 (1961). They also omit adultery. *Id.* at 462 (Frankfurter, J., concurring).

[8] Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & Rel. 525 (1999-2000); *see also* Legal Historians, Br. 28 ("the Ten Commandments have influenced some of our notions of right and wrong"); Resp. Br. 37 n.23. "That the Ten Commandments are, in some sense, a portion of a proto-legal code is not in dispute." Council for Sec. Humanism, Br. 9; Anti-Defamation League, Br. 26, *McCreary*, No. 03-1693 ("Undoubtedly, the

Commandments [have] been indirectly inspirational in the formation of legal norms ... is a relatively noncontroversial proposition." Green, *The Fount of Everything Just and Right*, 14 J.L. & Rel. at 530. Green recognizes the influence of the Decalogue in Europe, the New England colonies, and from the early 1800s onward in the "influential" writings of Blackstone, Joseph Story, the "widely-read" writings of David Hoffman, and court decisions. *Id.* at 531-43, 549-58.[9]

King Alfred's book of Dooms, the precursor to the common law which distilled the Anglo-Saxon laws, begins with the Ten Commandments.[10] The Decalogue did influence American law.[11] The Declaration does not say human rights originate from the people below, but that they are "endowed by their Creator" above. The Decalogue toc evinces rights to life, liberty and the pursuit of happiness in the commands regarding taking human life, theft, coveting, spousal and family relationships, and perjury. Daniel Webster echoed the

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Decalogue is of historical importance...").

[9] Green states that Story and Hoffman do not quote the Decalogue, but "[t]heir writings suggest they may have agreed with the proposition" that "the Ten Commandments serves as the foundation of American law." *Id.* at 553. Green also says that this Court's architecture portrays "the Ten Commandments ... as a primary source of American law." *Id.* at 525.

[10] *See id.* at 531; Harold J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* at 65 (1983).

[11] *See* Am. Ctr. for Law and Justice ("ACLJ"), Br. 4-9, *Van Orden*, No. 03-1500; Berman, *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. Cal. L. Rev. 1573, 1618-30 (1989)(the Decalogue was seen as "the basic source and summary of natural law"); Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale L.J. 1651, 1661-62, 1709-10 (1994); Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 Emory L.J. 777, 789 (1986); Daniel J. Boorstin, *The Americans: The Colonial Experience* at 18-19, 28 (1958)(Decalogue's influence during the Colonial period).

views of many when he argued to this Court that we "hold life, liberty, and property in this country upon a system of oaths," the basis of which is belief in God and the perjury Commandment.[12] Blackstone wrote of "the law of nature ... dictated by God himself." 1 *Commentaries* 41. "Jefferson, too, though against organized religion, believed firmly in 'nature's God,' 'the Creator,' the 'Supreme Judge of the World' – all terms found in the Declaration of Independence." Berman, *Religion and Law*, 35 Emory L.J. at 786.

Respondents and their amici admit that the principles contained in the Decalogue "informed our notions of right and wrong." These principles did provide the moral background of the Declaration and our legal tradition. Jefferson believed that all religions shared a "common morality which is essential to the welfare of society [and that] America needed religion to give it the necessary inner strength to survive." *Id.* "[T]o the extent that the Ten Commandments established ethical and moral principles, they were expressions of universal standards of behavior common to all western societies... . [T]hese moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed part of the moral background for the adoption of the national

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[12] *See* Daniel Webster, "The Christian Ministry and the Religious Instruction of the Young," in 6 *The Works of Daniel Webster* 168, 174 (19th ed. 1885). The case was *Vidal v. Girard's Executors*, 43 U.S. 127 (1844). Washington said, "Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice?" George Washington, Farewell Address (Sept. 19, 1796), in 35 *The Writings of George Washington* 214 (John C. Fitzgerald ed., 1940).

constitution."[13] The Commandments are a recognizable expression of these moral principles. Thomas Hobbes and John Locke used them for their moral significance, and many jurists believed that law should encapsulate moral law, particularly as set forth in the Decalogue.[14] The Founders were familiar with *The New England Primer*, "the most widely read book in America" between 1700 and 1850, that says the "moral law is summarily comprehended in the Ten Commandments." R.F. Butts & L.A. Cremin, *A History of Education in American Culture* 69 (1953).

Although the Foundations Document does not claim that the Decalogue inspired Jefferson or the Declaration, the significance of Moses and the Decalogue would not have been lost on the Founders.[15] The Sixth Circuit's contention that there is no "analytical" link between the Decalogue and the other documents lacks merit. The link includes (1) some

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[13] *State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013, 1024 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996). Alexis De Tocqueville wrote that although there are many sects in America, they "all preach the same morality in the name of God." 1 *Democracy in America*, pt. 1, ch. 9, p. 152 (1835)(reprint 1990).

[14] *See* Paul Grimely Kuntz, *The Ten Commandments on School Room Walls?*, 9 U. Fla. J.L. & Pub. Policy 1, 11-13 (1997); John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law*, 10 J.L. & Religion 433, 451 (1993-94); Berman, *Origins*, 103 Yale L.J. at 1661-62; Thomas Hobbes, *Leviathan*: Part III, ch. 42 (1651)(reprint 1958).

[15] Benjamin Franklin, Jefferson and John Adams were appointed on the afternoon of July 4, 1776, to create the Great Seal of the United States. Jefferson and Franklin proposed a depiction of Moses leading Israel in the Exodus. *See* James H. Hutson, *Religion and the Founding of the American Republic* 50-51 (Library of Congress, Washington, D.C., 1998). The proposed motto was "Rebellion to Tyrants is Obedience to God." During his Second Inaugural Address, Jefferson again evoked the Exodus event. *See A Compilation of the Messages and Papers of the President, 1789-1897*, 10 vols. (U.S. Government Printing Office, Washington, D.C.).

documents that played a role in the development of American law, (2) a universally recognized legal and moral code, and (3) a theme of liberty expressed by the rule of law.[16] The first two have already been addressed. The latter is evident by the parallels drawn between the Revolution and the Exodus. The Exodus began with "Let my people go" and reached its apex in the Commandments on Mt. Sinai. Jefferson and Franklin connected this theme with the Revolution. The Decalogue evokes notions of liberty because of the Exodus and the rule of law. When the law is king, there is little room for tyranny. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963).

Although the Display has secular themes of law, liberty, morality and government, the degree of an "analytical" link required by the Sixth Circuit finds no precedent. The "majority seems to envision a display that contains a recounting of the history of the nation's founding, a summary of American constitutional law and history, ... and I suppose, at least as much evidence as was presented to [the] court in the official record of more than 200 pages." PA 77a. In *Lynch*, this Court considered the context of a Christmas display. 465 U.S. at 679. Some symbols celebrated the holiday, but characters such as a clown, a dancing elephant, a robot, a teddy bear and a "talking wishing well" seemed disjointed, having no such connection. *Id.* at 671; *Allegheny*, 492 U.S. at 596, 598 ("whatever a 'talking' wishing well may be, it obviously was a center of attention separate from the

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[16] The "Trylon of Liberty" with the Decalogue in Hebrew is depicted outside the E. Barrett Prettyman Federal Courthouse in Washington, D.C.

creche"). That the display had a general but disjointed theme, or that it included a sectarian symbol, did not concern the Court.[17] "Of course the creche is identified with one religious faith," *Lynch*, 465 U.S. at 685, as the "chief symbol" of Christianity. *Id.* at 708 (Brennan, J., dissenting). Although it was "in a central and highly visible location," *id.* at 706, and "not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display – as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692 (O'Connor, J., concurring). "It would be ironic ... if the inclusion of a single [religious] symbol" acknowledged by "the Western World" as having a role in the development of law, "and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so 'taint' the [Foundations Display] as to render it violative of the Establishment Clause." *Id.* at 686. "To forbid this one passive symbol ... would be a stilted over-reaction contrary to our history and to [this Court's] holdings." *Id.*[18]

The importance of context is further illuminated in *Allegheny*. There the Court struck down the creche but upheld the menorah. The creche stood alone, but the 18-foot menorah was near a Christmas tree. Both are religious symbols. 492 U.S. at 580-81, 582, 586, 620. The failure to incorporate the creche with the secular holiday did not taint the *simultaneous* display of the menorah, any more than the *prior* displays

[17] The *Lynch* display included Jesus, Mary, Joseph, angels, shepherds, kings, and a church. 465 U.S. at 671; *Allegheny*, 492 U.S. at 596.

[18] Respondents admit that religious statements in the other historical documents "do not ... convert [them] into religious ones," but incorrectly allege that the Decalogue taints the entire Display. Resp. Br. 29 n.17; JA 10, #36 at 60-61, 64, 65, 70.

should taint the Foundations Display. The menorah and creche displays were judged independently. The creche alone presented only a religious message, but the "overall display" of the menorah did not. The display celebrated both the holiday season (Christmas and Hanukkah) and liberty. The menorah and the Christmas tree did not neatly fit with the theme of liberty or "with this Nation's legacy of freedom," but the multiple themes allowed "an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise." *Id.* at 619. A display can have more than one theme. Respondents contend that the Display contains one religious document unconnected with liberty. Petitioners contend otherwise, but the Court need not settle this matter. Multiple themes favor the secular purpose of the Display. The Display has the express theme of law, and at least secondary themes of liberty, morality and government. The Decalogue fits all these themes. The tightness of that fit is not the issue. Themes of law, liberty, morality and government are clearly secular. Like the menorah, the Decalogue is religious, but the "message is not exclusively religious." *Id.* at 613. But, even if it were exclusively religious like a creche, that does not affect the purpose in this context where the overall Display has undisputed secular themes. Hanukkah need not be characterized as a secular holiday, or the menorah as having a secular dimension, to conclude that the display "does not convey a message of endorsement of Judaism or of religion in general." *Id.* at 634 (O'Connor, J., concurring). This conclusion "does not depend on whether or not the city [could have used] 'a more secular alternative symbol.'" *Id.* at 636. Requiring that the government use a "'more secular alternative' [if] available is too blunt an instrument for Establishment Clause analysis." *Id.*

The argument that some parse the Ten Commandments

differently and the mere display violates *Larson v. Valente*, 456 U.S. 228 (1982), has been repudiated.[19] The *Larson* argument was rejected in *Lynch*, where the creche was in context with secular symbols. 465 U.S. at 687 n.13. In *Allegheny*, where the creche stood alone, *Larson* was mentioned, but where the menorah stood in context like the creche in *Lynch*, it was rejected. *Allegheny*, 492 U.S. at 605, 609, 618 n.68. Like the creche in *Lynch* and the menorah in *Allegheny*, the Decalogue is not presented for its religious or doctrinal import, any more than are the Hebrew-inscribed tablets in this Court. The Decalogue must not be severed from its context, nor must the secular aspects be severed from the religious, because it is a "unified whole." Baptist Joint Comm., Br. 9, *Van Orden*. Accepting the argument that any version of the Decalogue dooms the Display would mean that the Bible could never be taught due to its many translations. This Court has never suggested such an extreme application of the Establishment Clause.[20]

Determining the intended message is the only question under the purpose prong. That question must consider the entire context, not one micro-portion. The Display and the testimony state that the purpose is about law and government. Deference should be given to this stated purpose. Although Respondents argue this purpose was a sham, they were less certain in the District Court. "I think it would be a terrible mistake," they told the court, "to have identical displays in different counties, one of which is constitutional, one of

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[19] Christmas engenders more theological debate than the Decalogue, but such disputes become irrelevant in context. *See Allegheny*, 492 U.S. at 579 n.2; *Lynch*, 465 U.S. at 711-12 (Brennan, J., dissenting).

[20] *See Stone*, 449 U.S. at 42; *Schempp*, 374 U.S. at 225. Most know about Bible translations, but are clueless about Decalogue variations.

which is unconstitutional, solely because of bad purpose." JA 19, #71 at 25. "I don't think the court would be wise to rest its decision exclusively on sham purpose." *Id.* at 26. They conceded that the other documents "are perfectly legitimate and serve a perfectly valid secular purpose," they "are not religious documents," they don't "focus on religion," and even that the Ten Commandments "can play a role in the development of modern law and American politics. We don't dispute that." *Id.* at 18, 31, 87. Like the Sixth Circuit, they argue that the other documents were "unrelated" to the Decalogue. *Id.* at 31. But conceding, as they must, that the Decalogue plays a role in "the development of modern law and American politics," that the other documents also play such a role and that they "serve a perfectly valid secular purpose," makes the sham purpose argument a sham itself.

Before this Court is a Display about law contained in equal-sized frames. The District Judge observed, "the newly posted display differs, in my opinion, fundamentally from the other one." *Id.* at 4. The Displays appear "secular in their final version... ." Am. Humanist Assoc., Br. 6-7, *McCreary*, No. 03-1693. The expressed purpose is not an afterthought appended to a prior action. The purpose came into existence with the Display itself. The Display is fundamentally different than any prior display. Petitioners accepted the preliminary ruling on the second display. That display is dead and buried. Unlike *Santa Fe*, where the policy *on its face* provided for prayer, and where it effected no change (Pet. Br. 15), the Display is substantially different. To accept the "theory of indelible, unconstitutional taint" would mean that Petitioners could not even hire the ACLU to replicate this Court's East Pediment (where the Decalogue is central), or the Decalogue in Hebrew text on the south frieze. The Foundations Display does not emphasize the Decalogue. PA 35a. It confirms the

stated purpose. It is surrounded by a few hundred displays. This case presents an even easier question than the Decalogue standing alone. Here it is part of a larger Display on law; the setting is a courthouse; the viewers are adults, not juveniles; and the passerby is not led in prayer. The context does not celebrate religion as religion. The purpose is to educate about law. The Display matches the purpose. That purpose is not a sham. On this point alone, this Court should reverse.

B. The Display Satisfies The Effects Prong.

A reasonable observer viewing the entire context sees the title ("Foundations of American Law and Government"), the stated purpose, the equal-sized frames, the Decalogue as 1/10th of a secular Display about law, a hallway filled with scores of other documents, and is aware of the history and ubiquity of the Decalogue. The observer would know that the secular legal documents in the Display influenced the law, that the laws of murder, theft and adultery parallel the Decalogue, and that oaths are based on belief in God and the perjury Commandment.[21] An observer knows the numerous Sunday laws originated from the Sabbath Commandment.[22] This observer would recognize the Decalogue as a widely accepted symbol of law. Our observer would not be amazed that the Decalogue is *the* central feature on this Court's East Pediment, or that Moses holds tablets containing the *only written* words *inside* this chamber inscribed with unpointed

[21] Oaths traditionally require placing the right hand on the Bible and swearing "So help me God." *See also* WallBuilders, Br. 23-24, *McCreary*, No. 03-1693.

[22] *See McGowan*, 366 U.S. at 551 (Frankfurter, J., concurring)(Sunday laws in 50 states). *See also Strand Amusement Co. v. Kentucky*, 43 S.W.2d 321, 322 (Ky. 1931)(origin of Kentucky's Sunday law is the Decalogue).

Hebrew characters (רצח [kill], נאף [adultery], גנב [steal], ענה [testify], חמד [covet]), App. 1a, or that the Decalogue stands between the entrance of the National Archives and the Declaration and Constitution. This obvious ubiquity in the Nation's Capital is because the Commandments have played a significant a role in the development of our legal system.[23] Since 1872, Richmond County, Georgia, has used the Decalogue in its seal so that the "illiterate" could recognize legal documents, because "in addition to being a religious symbol, [it is] a secular symbol for the rule of law." *King v. Richmond County*, 331 F.3d 1271, 1277 (11th Cir. 2003). Even the Ninth Circuit has had the Decalogue in its seal for at least 100 years (www.ca9.uscourts.gov).[24]

The observer will know that Petitioners accepted the preliminary ruling on the second display, and that the Foundations Display "differs ... fundamentally" from the past. JA 19, #71 at 4. The unintended consequence of the past has served "to educate everyone" regarding the line between acknowledgment and establishment. *Id.* at 44. The observer knows that church-state law is confusing, and that county officials unversed in the complexities of this Court's opinions have tried their best to follow the ever-bending Establishment Clause line. The past has not tainted the observer's viewpoint; rather, it serves to clarify that constitutional vision.

In addition to history and the universally recognized symbol of law, the observer is also familiar with common slogans, like "The Ten Commandments of Golf." *See, e.g.*,

[23] *See* Pet. Br. 11 n. 8; United States, Br. 8 n.2, *McCreary*, No. 03-1693; WallBuilders, Br. 3-25.

[24] *See also Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004)(plaque on courthouse wall since 1918); *Freethought Soc'y v. Chester County*, 334 F.3d 247, 249 (3d Cir. 2003)(on courthouse wall since 1920). The Decalogue has been part of this Court since 1935.

ACLJ, Br. 20-21, App. C. The observer is familiar with "The Ten Commandments" movie, and may think of Moses when seeing Charlton Heston. Judicial opinions, references by the Executive, and Congressional resolutions highlight the Decalogue's ubiquity. The "Ten Commandments are so familiar and, ostensibly, uncontroversial." Anti-Defamation League, Br. 6. They are familiar "to most inhabitants of our Nation... ." *Id.* at 26. Any school kid would be impressed by this ubiquity after a day tour of the Capital. No wonder the twin tablets have become synonymous with law. *See* Pet. Br. 29 n.46. Our observer will not see the Display as a debate or think that Petitioners have taken sides. Could more documents be added? Sure, but the fact that Kwanzaa did not appear in *Lynch* or *Allegheny* is of no more constitutional significance than Hammurabi being absent here. Might some think the "Star-Spangled Banner" is out of place? Perhaps, but no more than a "talking wishing well" in *Lynch*.

The Decalogue is a unique symbol that speaks of law and morality, and which has influenced our common vernacular. The "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," 465 U.S. at 674, helps the observer to view the Display as a tolerable acknowledgment. A ruling in favor of Petitioners does not open the door for displaying every kind of religious imagery. Embedded deep in our Nation's history and our common practices, the Decalogue is in a category with few peers. As a widely recognized symbol of law, it does not appear odd, out of place or jolting in the Display. Scurrying through the Courthouse for an occasional, perhaps even rare, visit, our observer will not feel like an outsider. Political standing is not affected. Religion has not become relevant because of the Decalogue, any more than the Magna Carta favors the British. Certainly,

this busy citizen was not coerced to participate in a religious activity. Our observer will surely not find endorsement here. The Display poses no threat. To eradicate the Decalogue from the Display "would sever ties to a history that sustains this Nation even today." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2322 (2004)(O'Connor, J., concurring).

II. AN ACKNOWLEDGMENT OF RELIGION IS NOT AN ESTABLISHMENT OF RELIGION.

Petitioners assert that the *Lemon* test should be overruled or at least modified. *See* Pet. Br. 34-39. Respondents do not defend *Lemon*.[25] Petitioners' proposed test would find an acknowledgment if the activity (1) comports with history and ubiquity, (2) does not coerce participation in a religious exercise or activity, and (3) does not discriminate among sects based upon religious character alone.[26]

The coercive component makes the "absence of worship

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[25] *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), counsel against a rebuttable presumption. At any rate, the context of law here, like a public forum, rebuts any presumption concerning the Decalogue. *See Capitol Sq. Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995)(O'Connor, J., concurring in part).

[26] This test combines the "absence of worship or prayer" in *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2324-25 (2004)(O'Connor, J., concurring), with coercion, and clarifies that the "absence of reference to a particular religion" is understood as in *Lynch* and *Allegheny*. Acknowledgments do not violate *Larson v. Valente*, 456 U.S. 228 (1982). This test eliminates the "minimal religious content" component in *Newdow*, since it does not fit garden variety display cases. However, when applied to a universally recognized symbol of law like the Decalogue, the ceremonial nature of the symbol makes the several religious words inconsequential as an Establishment Clause matter. Respondents admitted below that text is permissible. JA 19, #71 at 29, 30.

or prayer" element in *Newdow* manageable, by prohibiting government from "compelling or coercing participation or attendance at a religious activity, requiring religious oaths, or delegating government power to religious groups." *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part, dissenting in part). "Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character." *Newdow*, 124 S.Ct. at 2327 (O'Connor, J., concurring).

The Decalogue in the East Pediment (tablets) and the south frieze (text) of this Court are acknowledgments. Whether displayed as tablets or engraved Hebrew text, they comport with history and ubiquity, do not coerce and do not favor one sect. They appear in the context of a court in a display on law and government. The same is true for the Decalogue on the door to this Court's chambers (Roman numerals). The Decalogue is a universal symbol of law and stands in a category with few peers. When displayed in a court setting, that setting itself gives the context of law.

Whether using the above test, Justice O'Connor's four-part test, or past precedent, the Foundations Display with the Decalogue is a tolerable acknowledgment of religion.

CONCLUSION

This Court should reverse the unprecedented application of *Lemon* and uphold the Foundations Display.

Respectfully Submitted,

Mathew D. Staver

APPENDIX

Moses with the Ten Commandments, U.S. Supreme Court Courtroom, *available at*, http://www.supremecourtus.gov/about/north&southwalls.pdf

Supreme Court, U.S.
FILED
DEC 8 - 2004
E CLERK

No. 03-1693

In the Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the display in a county courthouse of nine historical documents and symbols that pertain to the development of American law violates the Establishment Clause because one of the documents is the Ten Commandments.

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S. Con. Res. 13, 105th Cong., 1st Sess. (1997) 10
6 *The Works of John Adams, Second President of the United States* (Little & Brown eds. 1851) 9
W. Walsh, *History of Anglo-American Law* (1932) (W. Gaunts & Sons, Inc., 2d ed. 1993) 9

In the Supreme Court of the United States

No. 03-1693

MCCREARY COUNTY, KENTUCKY, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns whether the inclusion of the Ten Commandments in a governmental display of historical documents that influenced the development of American law violates the Establishment Clause. There are numerous displays of the Ten Commandments and similar religious symbols on federal property, including in federal courthouses, the United States Capitol, the National Archives, the Library of Congress, national monuments, and national park lands. The United States has participated as amicus curiae in prior cases addressing the constitutionality of governmental displays of religious symbols. See *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

STATEMENT

1. In 1999, petitioners posted framed copies of the Ten Commandments in the McCreary County and Pulaski County Courthouses. Pet. App. 6a.[1] After respondents filed

[1] Harlan County posted a series of displays that included the Ten Commandments in their public school classrooms, Pet. App. 6a-7a, but the constitutionality of those displays is not at issue here.

suit challenging the displays, petitioners put up new displays that consisted of a variety of historic and contemporary documents, some of which petitioners "displayed in their entirety," and others for which petitioners "include[d] only that document's reference to God or the Bible with little or no surrounding text." *Id.* at 8a (citation omitted). The district court issued a preliminary injunction requiring the immediate removal of the displays on the grounds that they lacked a secular purpose and had the effect of endorsing religion. The court further prohibited county officials from "erect[ing] or caus[ing] to be erected similar displays." *Id.* at 97a, 115a-138a, 139a-162a.

County officials then erected new displays in each courthouse that consisted of the complete text of the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Star Spangled Banner, the Preamble to the Kentucky Constitution, the Ten Commandments, and a picture of Lady Justice. Pet. App. 9a, 184a-212a. The documents were reproduced in nine, equally sized frames; none was given special prominence. *Id.* at 60a, 177a-178a. The documents were introduced by a plaque entitled "The Foundations of American Law and Government Display," which explains that the "display contains documents that played a significant role in the foundation of our system of law and government." *Id.* at 10a (citation omitted). With respect to the display of the Ten Commandments, that prefatory document explains:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are "Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Ibid. (citation omitted).

The district court ordered petitioners to remove the displays. Pet. App. 96a-114a. The court held that the Ten Commandments are "sacred text which has a religious purpose," and the "government must dilute this religious purpose if a truly secular purpose can be said to exist." *Id.* at 101a. The court then held that "educat[ing] the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government" and including the Ten Commandments "as part of the display for their significance in providing the 'moral background of the Declaration of Independence and the foundation of our legal tradition'" are not valid secular purposes, *id.* at 102a (citation omitted). In the court's view, the prior displays "imprinted the [petitioners'] purpose from the beginning, with an unconstitutional taint observed not only by this court, but by anyone acquainted with this litigation." *Id.* at 105a.

The district court also held that the courthouse displays had the primary effect of advancing religion. "Given the religious nature of [the Ten Commandments]," the district court explained, observers will perceive the government as "promot[ing] that one religious code as being on a par with our nation's most cherished secular symbols and documents" and of "foundational value to our shared history as citizens." Pet. App. 108a-110a.

2. a. A divided court of appeals affirmed. Pet. App. 1a-95a. The majority ruled that petitioners' "predominate purpose" for the displays, *id.* at 18a, was invalid because of the "lack of a demonstrated analytical or historical connection" between the Ten Commandments and the other documents in the display, *id.* at 27a. The court considered evi-

dence that the Ten Commandments did, in fact, influence the development of American law to be irrelevant because "th[at] evidence does not appear in the actual display of the Ten Commandments." *Id.* at 29a. The court further reasoned that the history of the displays "strongly indicated that the primary purpose was religious." *Id.* at 42a.

With respect to whether the display had the effect of endorsing religion, no majority opinion issued for the court. See Pet. App. 51a (Judge Gibbons' concurrence limited to the purpose inquiry). Judge Clay expressed his view that "the displays convey a message of religious endorsement because of the complete lack of any analytical connection between the Ten Commandments and the other patriotic documents and symbols." *Id.* at 46a. In his view, the Ten Commandments "stick[] out in the display like a proverbial 'sore thumb,'" such that "a 'reasonable person will think religion, not history.'" *Id.* at 47a (citation omitted).

b. Judge Ryan dissented. Pet. App. 52a-95a. He would have held that the secular purposes identified by petitioners are valid, because "[t]he influence of religion upon American law and government is a fact of American history and politics that has been widely recognized by scholars, jurists, legislators, presidents, and, not least, the Founders themselves." *Id.* at 64a. In his view, evidence of the Ten Commandments' historical influence need not be included in the display itself because "[g]overnment monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose." *Id.* at 81a. Judge Ryan also rejected the majority's conclusion that a short "history of unconstitutional displays" could be "used as a sword to strike down an otherwise constitutional display." *Id.* at 87a. With respect to endorsement, Judge Ryan stressed that

> [t]he history and ubiquity of the Ten Commandments in public buildings throughout the country * * * confirm[s] the obvious: The inclusion of the Ten Commandments in these displays did nothing more than acknowledge the indisputable historical role of religion, and especially the canons of the Decalogue, as one of many principles, ideas, values, and impulses that, taken together, influenced the founders of this republic in shaping our law and government.

Id. at 93a-94a.

3. The Sixth Circuit denied rehearing en banc, Pet. App. 163a-164a, with Chief Judge Boggs and Judge Batchelder dissenting. *Id.* at 171a-176a. Chief Judge Boggs objected to the panel's requirement of "'analytical or historical connection' between the religious item and other, secular items in the displays." *Id.* at 172a (citation omitted). The dissent also rejected the notion that the Counties' prior displays tainted the display at issue, reasoning that governments "should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law." *Id.* at 174a.

SUMMARY OF ARGUMENT

This Court has twice considered and twice upheld the inclusion of a religious symbol in a governmental display commemorating a variety of influences on the Nation's history and culture. Petitioners' inclusion of the Ten Commandments in a display that acknowledges multifarious influences on the development of American law should likewise be upheld. Justices of this Court, decisions of lower courts, and the writings of countless historians and academics have long recognized the significant influence that the Ten Commandments have had on the development of American law. Acknowledging that influence as part of a broader display memorializing historic contributions to American law

and government serves the valid secular purpose and secular effect of educating persons about the Nation's history and celebrating its heritage. Indeed, it is commonplace for courthouses and capitol buildings to include commemorative displays of legal, political, and cultural history, and that background tradition informs how displays like petitioners are reasonably perceived. Moreover, acknowledging that a document with religious significance also played an important role in the development of secular law in no way undermines or dilutes the religious significance of that document.

As this Court has repeatedly recognized, the political and legal history of the United States is infused with religious influences, and the Establishment Clause does not require government to ignore or minimize that reality. Governmental commemorations of history, heritage, and culture properly need not exclude references to religious influences. To hold, as the court of appeals did here, that any acknowledgment of religious history must be accompanied by elaborate disclaimers or explanations bespeaks a fundamental hostility to or suspicion of religion that has no place in Establishment Clause jurisprudence.

Finally, the court of appeals' conclusion that petitioners' prior displays and the litigation surrounding them indelibly tainted the current display is fundamentally flawed. First, the unconstitutionality of the initial display is not obvious and, in any event, the display at issue bears little resemblance to the aspects of the prior displays that troubled respondents. Second, governmental officials are presumed to adhere prospectively to their constitutional duties and, accordingly, courts should be reluctant to equate past conduct with a present invidious purpose to defy constitutional limits. The Establishment Clause inquiry should turn upon the objective purpose served by the display as a whole, not subjective motivation. While the always elusive hunt for subjective purposes does much to promote litigation, it does

little to promote Establishment Clause values in the context of passive displays in courthouses.

ARGUMENT

A COURTHOUSE DISPLAY OF THE TEN COMMANDMENTS AS ONE OF MULTIPLE INFLUENCES ON THE DEVELOPMENT OF AMERICAN LAW IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

A. Religious Faith Has Played A Defining Role In The History Of The United States

"[R]eligion has been closely identified with our history and government." *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 212 (1963). In fact, the deep-seated faith of many of the Framers laid the philosophical groundwork for the unique governmental structure they adopted. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Id.* at 213.

The Nation's religious roots found expression as well in the system of laws adopted by the federal and state governments. In particular, it is "undeniable * * * that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World," including the United States. *Stone* v. *Graham*, 449 U.S. 39, 45 (1980) (per curiam) (Rehnquist, J., dissenting). Indeed, it is widely recognized as a matter of

> historical fact that the Ten Commandments has served over time as a basis for our national law. * * * [A]t least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and

have formed a part of the moral background for the adoption of the national constitution.

State v. *Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1024 (Colo. 1995), cert. denied, 516 U.S. 1111 (1996).[2]

At the most basic level, the Ten Commandments underlay the common law prohibitions on murder, adultery, theft,

[2] See *Letters of John Quincy Adams, to His Son, on the Bible and Its Teachings* 61 (James M. Alden ed. 1850) ("The law given from Sinai was a civil and municipal as well as a moral and religious code; it contained many statutes * * * of universal application—laws essential to the existence of men in society, and most of which have been enacted by every nation, which ever professed any code of laws."); *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from denial of a writ of certiorari) (the Ten Commandments "have made a substantial contribution to our secular legal codes"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part) (courthouse display recognizing Moses with the Ten Commandments as a foundational lawgiver does not violate the Establishment Clause); *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987) (rejecting the suggestion that "the Ten Commandments played an exclusively religious role in the history of Western Civilization"); *Griswold* v. *Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (noting the nexus between "most criminal laws" and the Ten Commandments); *McGowan* v. *Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *Van Orden* v. *Perry*, 351 F.3d 173, 181 (5th Cir. 2003) (noting the Ten Commandments' "extraordinary influence" on "the civil and criminal laws of this country," which "has been repeatedly acknowledged by the Supreme Court and detailed by scholars" and has had "influence upon ethics and the ideal of a just society"), cert. granted, 125 S. Ct. 346 (2004); *Freethought Soc'y* v. *Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (there is a "well documented history" that "the Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity, including the prohibitions against murder and blasphemy"); *Books* v. *City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order."), cert. denied, 532 U.S. 1058 (2001); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29, 33-34 (10th Cir.) (the Ten Commandments have "substantial secular attributes" and are a "foundation for law"), cert. denied, 414 U.S. 879 (1973).

blasphemy, and perjury, which American law carried forward.[3] The Sunday Closing Laws upheld by this Court in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), likewise are directly traceable to the Fourth Commandment to keep the Sabbath day. *Id.* at 470-495; see *City Council* v. *Benjamin*, 33 S.C.L. 508, 523 (S.C. Ct. App. 1848); *Kountz* v. *Price*, 40 Miss. 341 (Miss. 1866). That same Commandment underlies the constitutional provision that excepts Sundays from the ten-day period for exercise of the presidential veto. U.S. Const. Art. I, § 7, Art. VII.[4]

At a more general level, the Ten Commandments reflect the historical reality that many early efforts at regulating human conduct had religious origins. In fact, in 1997, the House and Senate passed concurrent resolutions acknowledging that (i) "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization," (ii) "the Ten Command-

[3] See, *e.g.*, 1 William Blackstone, *Commentaries on the Laws of England: of the Rights of Persons* 54 (1765) (Univ. of Chi. Press 1979) (with respect to *malum in se* crimes like murder, theft, and perjury, the legislature "acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts"); 6 *The Works of John Adams, Second President of the United States* 9 (Little & Brown eds., 1851) ("If 'Thou shalt not covet,' and 'Thou shalt not steal,' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.").

[4] See W. Walsh, *History of Anglo-American Law* 85 (1932) (W. Gaunts & Sons, 2d ed. 1993) (the 1641 Massachusetts "Body of Liberties" made the Ten Commandments "the basis of the criminal law"); Amicus Nat'l Legal Found. Br. 3-23, *ACLU* v. *McCreary County*, No. 01-5935 (6th Cir.) (chronicling the influence of each Commandment on colonial law governing blasphemy, profanity, idolatry, Sunday closings, murder, adultery, theft, perjury, defamation, and election fraud); *Hollywood Motion Picture Equip. Co.* v. *Furer*, 105 P.2d 299, 301 (Cal. 1940) ("'Thou shalt not steal' applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel.") (citation omitted); *Watts* v. *Gerking*, 228 P. 135, 141 (Or. 1924) ("'Thou shalt not bear false witness' is a command of the Decalogue, and that forbidden act is denounced by statute as a felony.") (citation omitted).

ments set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society," and (iii) "the Ten Commandments are a declaration of fundamental principles that are the cornerstones of a fair and just society." S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H.R. Con. Res. 31, 105th Cong., 1st Sess. (1997).[5]

B. Official Acknowledgment And Recognition Of The Ten Commandments' Influence On American Legal History Comport With The Establishment Clause

1. *Official acknowledgments of religion's role in the Nation's history are commonplace*

There "is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984), and "references to the Almighty [have] run through our laws, our public rituals, [and] our ceremonies" since the founding of the Country. *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).[6] The First Congress—the same Congress that drafted the Establishment Clause—adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. See *Marsh* v. *Chambers*, 463 U.S. 783, 787 (1983). That Congress, the day after the Establishment Clause was proposed, also urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.'" *Lynch*, 465 U.S. at 675 n.2 (citation omitted). Since the time of Chief Justice Marshall, this Court has opened its sessions with "God save the United States and this Honorable Court." *Engel* v. *Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). In 1865, Congress authorized the inscription of "In God we trust" on United States coins. Act of March 3, 1865, ch. 100, § 5, 13 Stat. 518. In 1956, Congress made "In God we trust" the National Motto, see 36 U.S.C. 302, and directed that it be inscribed on all currency, 31 U.S.C. 5112(d)(1).

Because of the Decalogue's influential role in the development of American law, reproductions and representations of the Ten Commandments have been commonly employed across the Country to symbolize both the rule of law itself, as well as the role of religion in the development of American law. Moses with the Ten Commandments appears, alongside other historic lawgivers, in a frieze within the chamber of this Court, as well as on the east facade of the Supreme Court building. A statue with Moses holding the Ten Commandments appears in the rotunda of the Library of Congress, while the main reading room includes a painting of a woman raising her hands in prayer, with the Ten Commandments by her side. The National Archives has embossed on the marble floor of the main display room a bronze seal that includes a depiction of the Ten Commandments. Similar displays of the Commandments appear at the Ronald Reagan International Trade Building in Washington, D.C., as well as other federal buildings and courthouses across the Country. An informal and non-exhaustive survey reveals that displays of the Ten Commandments appear in courthouses, capitols, and other public buildings across the Country. See App., *infra*; see also Pet. App. 175a; Pet. 8-13 (discussing numerous lower court cases addressing displays

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[5] See generally D. Davis, *Religion and the Continental Congress, 1774-1789* (2000); Joseph Story, *Value and Importance of Legal Study* (Aug. 25, 1829), *reprinted in* W. Story, *The Miscellaneous Writings of Joseph Story* 533-535 (1852) (connecting natural law and a person's "duties to God," which sit "at the foundation of all other laws").

[6] See *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2317 (2004) (Rehnquist, C.J., concurring in the judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954)); *id.* at 2320 ("From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.").

of the Ten Commandments by state and local governments). Indeed, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring in the judgment). And "[e]radicating such references would sever ties to a history that sustains this Nation even today." *Ibid.*

2. *The Establishment Clause permits official acknowledgment of the Ten Commandments' contribution to the Nation's legal heritage*

a. *Similar displays that acknowledge religious influences have been upheld*

This Court has twice considered and twice sustained governmental displays that integrate overtly religious symbols and secular symbols of the Nation's heritage and culture. In *Lynch* v. *Donnelly*, *supra*, the Court held that the Establishment Clause permits a city to include a nativity scene as part of a display that comprised "many of the figures and decorations associated with Christmas," 465 U.S. at 671, including a Santa Claus house, a Christmas tree, cutout figures of a clown, elephant and teddy bear, and a talking wishing well, *id.* at 671, 685 n.12; *id.* at 695 n.1 (Brennan, J., dissenting). Erecting the display to "depict the historical origins of [a] traditional event long recognized as a National Holiday," the Court concluded, serves a valid, secular goal. *Id.* at 680. In so holding, the Court refused to "focus[] almost exclusively on the creche," considering it sufficient that the display as a whole "principally take[s] note of a significant historical religious event long celebrated in the Western World." *Ibid.*

The Court further held that inclusion of the creche in the display did not have the effect of advancing religion because any benefit to "one faith or religion or to all religions[] is indirect, remote and incidental," and "display of the crèche is no more an advancement or endorsement of religion than the

Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683. The court stressed that the creche is a "passive symbol," indistinguishable from "a host of other forms of taking official note of * * * our religious heritage," *id.* at 686, that do not violate the Establishment Clause, *id.* at 685-686. While such a display "advances religion in a sense," the Court explained that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Id.* at 683. To hold otherwise and to forbid passive "acknowledgment of the religious heritage" of the Nation "would be a stilted overreaction contrary to our history and to our holdings." *Id.* at 686.

Likewise, in *County of Allegheny*, *supra*, the Court sustained the inclusion of a Menorah as part of a holiday display that included a Christmas tree and a sign saluting liberty. 492 U.S. at 614. A plurality held that, considered as a whole, the display did not amount to an "endorsement of religious faith but simply a recognition of cultural diversity." *Id.* at 619. Justice O'Connor concurred, explaining that "[a]lthough the religious and indeed sectarian significance of the menorah is not neutralized," the "particular physical setting" in which the menorah appeared "changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 635 (internal quotation marks and citations omitted). Justice Kennedy, along with the Chief Justice, Justice White, and Justice Scalia, also concluded that the display was constitutional, because "the city and county sought to do no more than celebrate the season * * * and to acknowledge * * * the historical background and the religious, as well as secular, nature of

the Chanukah and Christmas holidays." *Id.* at 663 (internal quotation marks omitted).

Moreover, in *Stone*, *supra*, the Court recognized that the Ten Commandments may constitutionally be employed, even in the school context, when "integrated into the * * * curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. In *Stone*, the Court held unconstitutional a state statute that required the posting of the Ten Commandments by themselves on the wall of public school classrooms. But, as the Court later explained, *Stone* "did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987); see *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (although the posting of the Ten Commandments in *Stone* "plainly had some secular objectives, such as instilling most of the values of the Ten Commandments and illustrating their connection to our legal system," the state law there was unconstitutional because those secular purposes were "dominated by religious purposes") (citations omitted); *City of Elkhart* v. *Books*, 532 U.S. 1058 (2001) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from the denial of certiorari) ("[W]e have never determined, in *Stone* or elsewhere, that the Commandments lack a secular application.").

b. *Petitioners' display serves a legitimate secular purpose*

For the same reasons this Court upheld the display of a creche in *Lynch* and a menorah in *County of Allegheny*, petitioners' integrated display of the Ten Commandments is consistent with the Establishment Clause. As in those cases, petitioners' recognition of religious influences on legal history serves a valid secular purpose and does not have the

effect of advancing or inhibiting religion. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 222-223 (1997).

Governmental action runs afoul of the Establishment Clause's purpose inquiry only if it is "entirely motivated by a purpose to advance religion." *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985); see *Lynch*, 465 U.S. at 680 (law invalid if "there [is] no question" that it is "motivated wholly by religious considerations"). No such showing was made here. Petitioners' display of nine separate historical documents and symbols that have played a role in the development of American law and government—the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Bill of Rights, the Preamble to the Kentucky Constitution, the National Motto, Lady Justice, the Star Spangled Banner, and the Ten Commandments—serves the valid secular purpose of memorializing and educating the public about the roots of the Nation's legal system. Both the district court (Pet. App. 101a-102a) and the court of appeals (*id.* at 17a-18a) found that petitioner designed its display, *inter alia*, "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." That, in fact, is precisely how the explanatory plaque that accompanies the display describes its purpose, labeling the collection "The Foundations of American Law and Government Display." *Id.* at 10a. The prefatory plaque further explains that the Ten Commandments are included because they "have profoundly influenced the formation of Western legal thought and the formation of our country" and they provide "the moral background of the Declaration of Independence and the foundation of our legal tradition." *Ibid.* (citation omitted).[7]

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[7] Petitioners' purposes also included a desire "to erect a display containing the Ten Commandments that is constitutional," "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government," and to acknowledge the Ten Commandments'

Memorializing the confluence of secular and religious influences that gave birth to the American legal system is a valid secular purpose. *Lynch* made clear that the Establishment Clause does not proscribe the government from "taking official note of * * * our religious heritage," 465 U.S. at 686, or depicting with a religious symbol "the historical origins" of attributes of the Nation's character, *id.* at 680. Such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," *id.* at 686, is consistent with the Establishment Clause because it simply takes note of the historical *facts* that "religion permeates our history," *Edwards* v. *Aguillard*, 482 U.S. 578, 607 (1987) (Powell, J., concurring), and that religious faith played a singularly influential role in the settlement of this Nation, in the founding of its government, and particularly in the development of its laws. "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

While the Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970), the Clause was never intended to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens," *County of Allegheny*,

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significance in providing "the moral background for the Declaration of Independence and the foundation of our legal tradition." Pet. App. 17a (citation omitted). The court of appeals properly ruled (*id.* at 18a-21a) that the latter two purposes were facially constitutional because "*Stone* established no per se rule that displaying the Ten Commandments in an educational setting is unconstitutional" (*id.* at 20a). And the court correctly characterized the first purpose as a desire "simply to comport governmental conduct * * * with the law." *Id.* at 19a.

492 U.S. at 623 (O'Connor, J., concurring), or to compel official disregard of or stilted indifference to the Nation's religious heritage in passive governmental displays pertaining to American history and culture. "[T]o do so would exhibit not neutrality but hostility to religion." *Ibid.*

Indeed, this Court itself has "asserted pointedly" on five different occasions that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch*, 465 U.S. at 675; *Marsh*, 463 U.S. at 792; *Walz*, 397 U.S. at 672; *Schempp*, 374 U.S. at 213; *Zorach*, 343 U.S. at 313. The Establishment Clause does not deny petitioners the equivalent capacity to acknowledge officially the pivotal role that religion has played in developing the Nation's laws and governmental institutions.

The court of appeals nevertheless ruled that petitioners' "actual purposes were religious." Pet. App. 23a. That conclusion rests on four flawed premises.

First, by "focusing" its purpose inquiry "almost exclusively on the" Ten Commandments the court of appeals "plainly erred." *Lynch*, 465 U.S. at 680. The court repeatedly found fault, not with the display as a whole, but with petitioners' perceived rationale for including the Ten Commandments in the display. Pet. App. 27a, 32a-33a. But a "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. The relevant consideration is whether the display *as a whole* serves a valid secular purpose. *Ibid.* (holiday display as a whole "principally [took] note of a significant historical religious event long celebrated in the Western World"); *id.* at 691 (O'Connor, J., concurring) (district court erred in attempting to "ascertain the city's purpose in displaying the creche separate and apart from the general purpose in setting up the display").

Likewise, in *County of Allegheny*, the Court analyzed the "combined display of the tree, the sign, and the menorah," rather than focusing on the presence of the Menorah or the specific reasons for its inclusion. 492 U.S. at 616. Moreover, the Court stressed that the inclusion in the display of an "explanatory plaque," like the one posted by petitioners here (Pet. App. 9a-10a), confirmed that the display served "not [as] an endorsement of religious faith but simply a recognition of cultural diversity." 492 U.S. at 619; see *id.* at 625 (O'Connor, J., concurring) (religious symbol "had to be viewed in light of the total display of which it was a part"); see also *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 656-657 (2002).

Indeed, the court of appeals' isolated scrutiny of petitioners' purpose for displaying the Ten Commandments erroneously imports a "least religious means" test into the Establishment Clause, a proposition this Court soundly rejected in *Lynch*. See 465 U.S. at 681 n.7 (summarily dismissing the argument that "the city's objectives could have been achieved without including the creche in the display") (citation omitted); see also *County of Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring) (existence of "a more secular alternative symbol" is "irrelevant" and "too blunt an instrument for Establishment Clause analysis") (citation omitted).[8]

[8] For the same reasons, the court of appeals' objection (Pet. App. 32a, 34a) that petitioners' display omitted "other influences" on the law is misplaced. The Establishment Clause imposes no such all-or-nothing mandate. The County of Allegheny could have chosen from a host of symbols, other than the menorah, that would have served equally well to commemorate liberty or the holiday season. It certainly did not exhaust the universe of potentially relevant non-religious symbols. Nevertheless, the fact that the County chose the menorah did not suggest to this Court that the County was "utterly ignoring (and implicitly denying) all other influences," *id.* at 32a, on the season. The question under the Establishment Clause is not whether other symbols might have been chosen or could be added to the display. Rather, the controlling question is whether the display as a whole serves a secular purpose. A display memorializing some of the important influences on the development of American law does exactly that, even if it does not exhaustively document every possible religious or secular influence on the law.

Second, the court's insistence that the display itself must detail the "analytical or historical connection" between the religious symbol and other components of the display (Pet. App. 27a) and include "evidence" of the Ten Commandments' historical influence (*id.* at 29a) lacks any foundation in law or logic. No such exegesis was required in *Lynch* or *County of Allegheny*. In *Lynch*, the connection between a talking wishing well, clown cut-outs, and a creche was not explained, beyond the posting of a sign reading "Seasons Greetings." 465 U.S. at 671, 685 n.12. In *County of Allegheny*, the only connection between the Christmas tree and the Menorah was a city sign advising passers-by that "the city of Pittsburgh salutes liberty." 492 U.S. at 582 (plurality opinion). And American currency lacks any explanation at all of the linkage between "In God We Trust" and the outline of Monticello or the profile of President Lincoln. Petitioners' lengthy discussion of the unifying purpose of its display—documentation of historic influences on the development of law, including an explanation of the Ten Commandments' role—far exceeds the level of explanation and integration offered in those cases and "confirm[s]" the secular purpose of the overall display that its visible content and "context already reveal[]." *Id.* at 619.

Furthermore, the court of appeals' approach, which treats the inclusion in a display of a religious symbol—and only the religious symbol—as so inherently suspect as to require some sort of curative instruction bespeaks a level of hostility to religion that is antithetical to the very purpose of the Establishment Clause. Simply "because it's religious" is an insufficient reason to subject acknowledgments of religious history in a broadly diverse display to special disabilities. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 122

(2001) (Scalia, J., concurring) (citation omitted). Government need not—indeed, may not—treat religion "as subversive of American ideals." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

Nor does the Sixth Circuit's insistence on elaborate exegesis make practical sense. Petitioners' collection of historic documents pertaining to the law was displayed in a courthouse. That is a site frequented by adults, who are capable of discerning a secular common theme from a display that contains multiple historical documents and that is prominently labeled "The Foundations of American Law and Government Display." Pet. App. 10a. Indeed, the courthouse setting lends itself to a focus on the Ten Commandments' character as a code of conduct, as opposed to its undeniable religious character. Cf. *King* v. *Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) ("Much of our private and public law derives from the[] final six commandments."). In fact, as a matter of common practice, government buildings like courthouses and statehouses routinely display historic documents, art, and similar displays about the law, government, traditions, and culture of the citizenry.[9] Most persons thus are not surprised to find displays like petitioners' in government buildings and they perceive such displays as a civics analog to museum presentations.[10] In that context, acknowledging religious influences on history on equal terms with other influences demonstrates neutrality, not endorsement, and further curricular explanation or integration is not

[9] The McCreary County courthouse contains 58 historical documents posted in the Judge's office, 41 in the waiting room, 124 in the side entrance to the courthouse, 33 in the fiscal courtroom, and 28 in the conference room. Pet. 6. The Pulaski County courthouse likewise posts numerous historical documents throughout the building. *Ibid.*

[10] See *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring); *id.* at 683 ("the exhibition of literally hundreds of religious paintings in governmentally supported museums" does not constitute the endorsement of religion); *County of Allegheny*, 492 U.S. at 595 (Blackmun & Stevens, JJ.) (same).

constitutionally required. Cf. *Board of Educ.* v. *Mergens*, 496 U.S. 226, 249 (1990) ("Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.'") (citation omitted). Courts have few tools to parse displays and determine whether those components of a secular display with religious, as well as secular, significance are given too much prominence. It would be akin to faulting a public museum's display of early European paintings for having too many religious subjects. Instead, when a display has an overall secular theme, courts should not treat religious references as so inherently abnormal or unnatural as to "stick[] out * * * like a proverbial sore thumb." Pet. App. 47a (citation omitted). Treating only those components of a secular display that have both religious and secular aspects as uniquely disfavored and treating facts about the Nation's and government's religious origins as uncomfortable past that must be ignored or at least minimized would stand the First Amendment on its head.[11]

Third, the court of appeals reasoned (Pet. App. 23a) that an illicit religious purpose must be at work because the court disagreed (at great length, see *id.* at 27a-32a) with petitioners' view that the Ten Commandments influenced the writing of the Declaration of Independence (*id.* at 29a). That misses the point. Whatever the precise nexus between the

[11] For the same reason, Judges Clay's and Martin's fear (Pet. App. 169a) that upholding petitioners' display would open the door to a display consisting of "a crucifix or the Lord's Prayer, so long as surrounded by the Magna Carta, the Declaration of Independence, the Star Spangled Banner and, perhaps, excerpts from the Internal Revenue Code" is misplaced. The fact that a display is uncommonly silly or disunified does not render it an establishment of religion. Indeed, there is no sound basis for assuming that a reasonable observer would perceive such a display as a covert endorsement of the Lord's Prayer, rather than simply as a confusing melange of images. On the other hand, a pervasively religious display would not lose that character by the random insertion of a secular document or symbol.

Ten Commandments and the Declaration of Independence, the only relevant inquiry under the purpose prong of the Establishment Clause inquiry is whether the display was "entirely motivated by a purpose to advance religion." *Wallace*, 472 U.S. at 56; see *Lynch*, 465 U.S. at 680. Given that (i) petitioners entitled their display "The Foundations of American Law and Government Display"; (ii) petitioners explained to the public that the Ten Commandments were included in that display because they "have profoundly influenced the formation of Western legal thought and the formation of our country," and "provide the moral background of the Declaration of Independence and the foundation of our legal tradition," Pet. App. 10a; and (iii) numerous Justices of this Court, judges, academics, and historians have acknowledged the influence of the Ten Commandments on American law, see pp. 7-10, *supra*, the court's debate over the Ten Commandments' particularized impact on the Declaration of Independence does nothing to dispel petitioners' secular purpose for displaying the Ten Commandments here.[12]

Fourth, the court of appeals concluded that petitioners' predecessor displays and the attendant litigation "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint" (Pet. App. 41a), and "strongly indicated that the primary purpose was religious" (*id.* at 42a). That rationale is mistaken on multiple levels.

As an initial matter, the predicate assumption that petitioners' first courthouse display of the Ten Commandments

[12] Having said that, there is substantial force to petitioners' assertion that the Ten Commandments influenced the Declaration of Independence. As the Court has recognized, "[t]he fact that the Founding Fathers believed devotedly that there was a God"—the First Commandment—"and that the unalienable rights of man"—the rights to life, liberty, property, and the pursuit of happiness reflected in the Sixth, Seventh, Eighth, Ninth, and Tenth Commandments—"were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. at 213.

was so clearly unconstitutional as to reflect an impermissible and indelible religious motivation is wrong. While a closely divided, per curiam opinion of this Court previously had struck down a display of the Ten Commandments in public school classrooms, *Stone* v. *Graham*, *supra*, that holding does not necessarily extend to courthouses because the Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in [public] elementary and secondary schools." *Edwards*, 482 U.S. at 583-584; compare *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992) (prayer at secondary school graduation unconstitutional), with *Marsh*, *supra* (upholding prayer in state legislatures). Thus the constitutionality of a display of the Ten Commandments in non-school settings—especially in courthouses where historic symbols of law are commonplace and where the Ten Commandments' character as a code of conduct is accentuated—remains an open question. Petitioners, moreover, acted against a legal backdrop in which three Justices of this Court had expressed the view that "a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an *equivocal message*, perhaps of respect for Judaism, for religion in general, or for law." *County of Allegheny*, 492 U.S. at 652 (Stevens, J., concurring in part and dissenting in part) (emphasis added). In addition, the Court had upheld prayer in state capitols, *Marsh*, *supra*, and has repeatedly stated that acknowledgments of the Nation's religious history in the National Motto ("In God We Trust"), on currency, and in the opening cry of court sessions ("God Save the United States and this Honorable Court"), are constitutional. See, *e.g.*, *Newdow*, 124 S. Ct. at 2317-2319 (Rehnquist, C.J., concurring in the judgment); *Lynch*, 465 U.S. at 674-679. Furthermore, a number of courts have upheld government displays of the Ten Commandments.[13]

[13] See *Van Orden*, 351 F.3d at 178-180; *Freethought Soc'y*, 334 F.3d at 263-267; *Anderson*, 475 F.2d at 33-34; *Freedom from Religion Found.*, 898

Beyond that, context-sensitive nuance and fine line-drawing are the hallmarks of this Court's Establishment Clause jurisprudence. For that reason, a single district court ruling that a prior display crossed the "blurred, indistinct, and variable barrier" between constitutional and unconstitutional acknowledgments of the Nation's religious heritage, *Lynch*, 465 U.S. at 679, is too tenuous a basis on which to predicate a charge of enduring unconstitutional motivation. It certainly does not amount to the clear evidence generally required to overcome the presumption that government officials, who are sworn to uphold the Constitution, will not deliberately flout their obligations. To hold otherwise would have the unhealthy consequence of punishing the good faith efforts of government officials to navigate difficult constitutional shoals.[14]

The Sixth Circuit further erred in placing weight on petitioners' desire "to display the Ten Commandments." Pet. App. 40a. Putting aside the debatable proposition that such a purpose is inherently "religious" (*ibid.*), the Establishment Clause focuses on "the legislative *purpose* of the [display], not the possibly religious *motives* of the" government officials who authorized it. *Mergens*, 496 U.S. at 249; see *McGowan*, 366 U.S. at 469 (opinion of Frankfurter, J.). A creche that forms part of a city's display consistent with *Lynch* should not be unconstitutional because the mayor's

P.2d at 1025. To be sure, the interim display adopted immediately after the filing of this suit raises additional issues. But that is also the least relevant display because it says nothing about petitioners' original reason for displaying the Ten Commandments, nor does it resemble the policy at issue now. Instead, it appears to reflect only petitioners' response to the filing of a lawsuit.

[14] See *National Archives & Records Admin.* v. *Favish*, 124 S. Ct. 1570, 1581 (2004); *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that these school officials will act in good faith."); cf. *Agostini*, 521 U.S. at 226 (refusing to "presume that * * * a full-time public employee * * * will depart from her assigned duties and instructions and embark on religious indoctrination").

first instinct was to display a creche, rather than a talking wishing well, at Christmas time. The avowed purpose of the display at issue here, as corroborated by its actual content and design, is to document historical influences on the development of the law, and that is the secular and constitutionally proper purpose that matters under *Lynch* and *County of Allegheny*.

Nothing in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), is to the contrary. There, the Court struck down a policy of student-led prayer at football games. The Court concluded that allowing the students to vote on retaining the invocation policy and selecting the speaker simply perpetuated the prior practice of prayer by the Student Chaplain before football games. *Id.* at 309. The Court did not hold, however, that past practice indelibly taints all of the officials' future decisions. Instead, the Court concluded that the new "invocations" policy lacked any secular purpose. *Ibid.* (noting that the new policy had a religious title ("Prayer at Football Games") and that the school did not hold a new election, pursuant to the new policy, "to replace the results of the previous election, which occurred under the former policy"). Furthermore, the Court also found that the new policy had the effect of advancing religion. *Ibid.*

That bears no resemblance to this case. When displayed in a courthouse, the Ten Commandments are not, like the school prayer in *Santa Fe*, inherently religious—their signification is, to use Justice Stevens' word, "equivocal." *County of Allegheny*, 492 U.S. at 652. In addition, petitioners worked profound changes in the content and design of their display so that the links between the policies were broken and, whatever their underlying subjective motivations, the objectively discernible purpose of the presentation changed from a display of the Ten Commandments to a display of varied historic influences on the development of law. See

3/30/01 Tr. 4 (district court finds that "the newly posted display differs * * * fundamentally from the other one").

Indeed, in the context of passive governmental displays in non-school settings, an inquiry into the subjective purpose of governmental actors rather than the objective purpose served by the display is of dubious value. The public expects to see in courthouses and capitol buildings representations, symbols, and displays pertaining to the history, heritage, and culture of the people and their government. The predominantly adult observers of such displays understand them to be commemorative, chosen for their historical or sociological linkage to the particular setting, rather than as specific endorsements of the underlying message. Government officials may have a variety of reasons for including or excluding certain symbols. Even an affirmative desire to include symbols with both religious and secular significance in a manner that is consistent with this Court's cases and the Nation's history would not trench upon Establishment Clause values. In fact, the reasonable observer is aware that "[g]overnment policies of * * * acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part). That is particularly true when, as here, the religious acknowledgment is neutrally displayed in the company of numerous secular emblems.

Accordingly, the Establishment Clause inquiry for such displays should focus on whether the display itself—based on its design, content, or emphasis—objectively expresses favoritism for or an endorsement of religion or particular religious beliefs. Such passive displays, after all, do not attempt to compel, direct, or regulate primary behavior. They are entirely non-coercive. And "[i]n a pluralistic society a variety of motives and purposes are implicated" in virtually every governmental acknowledgment of religion. *Lynch*, 465

U.S. at 680. Given the Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute," *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983), the high jurisprudential costs of questioning motives are not offset by any discernible constitutional gain in having the lawfulness of identical governmental displays turn upon unarticulated and imperceptible subjective purposes that are neither communicated to nor felt in any concrete way by anyone who encounters the passive display. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968) (it is a "fundamental principle of constitutional adjudication" that the judiciary may not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted").

c. Petitioners' display has the valid secular effect of acknowledging the Ten Commandments' historical influence on American law

The "crucial" consideration in analyzing whether petitioners' display comports with the Establishment Clause is whether it "ha[s] the effect of communicating a message of government endorsement or disapproval of religion" to an objective observer. *Lynch*, 465 U.S. at 692; see *Santa Fe*, 530 U.S. at 308. The objective observer, moreover, "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).[15]

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[15] The court of appeals did not issue a majority holding on the effect prong of the Establishment Clause. Nevertheless, because the relevant facts are not in dispute, the Court may wish to resolve the issue itself rather than return petitioners to yet another round of litigation over their display. Neither the district court nor the court of appeals grounded their Establishment Clause ruling in the fact that petitioners chose to use a Protestant version of the Ten Commandments, rather than a Catholic, Jewish, or ecumenical version. If the Court were to consider that factor

No reasonable observer could discern an endorsement of religion from petitioners' display. The Ten Commandments appear alongside and on equal footing with numerous secular documents and symbols. Taken together, the display tells a story about the varied historic influences on and images of American law. Lest there be any confusion on that front, petitioners took the extra step of including an explanatory plaque and caption that advise observers that the display documents "The Foundations of American Law and Government." Pet. App. 10a.[16] That is precisely the type of exhibit that a reasonable observer would expect to find in a courthouse. Thus the context and the "history and ubiquity" of the Ten Commandments' usage as a symbol of law, *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring), confirm the secular theme. The endorsement analysis also must take into account this Court's repeated assurances that the "many manifestations in our public life of belief in God," *Engel*, 370 U.S. at 435 n.21, far from violating the Constitution, have become "part of the fabric of our society," *Marsh*, 463 U.S. at 792.[17]

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relevant to the Establishment Clause question, it would be beneficial if the Court, prior to remanding, could make clear that display of some versions of the Ten Commandments (whether ecumenical or containing only Roman Numerals) would not have the effect of endorsing religion.

[16] See *County of Allegheny*, 492 U.S. at 619 (Blackmun, J.) ("[A]n 'explanatory plaque' may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs."); *id.* at 635 (O'Connor, J.) (sign accompanying menorah display negated any reasonable impression of endorsement); *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he presence of a sign disclaiming government sponsorship or endorsement on the Klan cross * * * would make the State's role clear to the community.").

[17] The presentation of the Ten Commandments (i) in a courthouse frequented by adults, (ii) alongside secular documents, (iii) accompanied by an explanatory plaque, and (iv) in a manner that does not peculiarly profile or call attention to the religious document or even the religious character of the document, distinguishes this case from *Stone*.

Judge Clay reasoned (Pet. App. 45a) that the display had the effect of endorsing religion because posting the Ten Commandments with other American historical documents "accentuates the religious nature of the Ten Commandments" and will suggest that petitioners put the Commandments "on a par with our nation's most cherished secular symbols and documents." The short answer is that this Court drew precisely the opposite conclusion about the effect of religious symbols in multi-component displays in *Lynch* and *County of Allegheny*, where the Court concluded that the surrounding symbols would negate any message of endorsement and would convey an overarching secular message about celebration of the holidays and their history. *County of Allegheny*, 492 U.S. at 616; *id.* at 634-635 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 681-686.

Judge Clay further reasoned (Pet. App. 46a) that the absence of "any analytical connection between the Ten Commandments and the other patriotic documents and symbols" meant that the display "convey[ed] a message of religious endorsement." That rationale fares no better under the effects prong than it did under the purpose prong. See pp. 19-21, *supra*. First, the analytical connection is exactly the one that numerous Justices, judges, historians, and scholars have found—the Ten Commandments influenced the development of American law. Second, and in any event, the conclusion does not follow from the premise. Even if the display were thematically disjointed, there is no logical reason to presuppose that observers would immediately jump to the conclusion that the display is a cleverly disguised religious message. The more likely reaction is simply that the display is a muddle.

Finally, Judge Clay suggested (Pet. App. 49a) that the litigation history "bolstered the reasonable observer's perception of the state endorsement of religion." That cannot be right. It is one thing to impute to the reasonable observer an

awareness of her surroundings and familiarity with the nature of the forum in which a display occurs. *Pinette*, 515 U.S. at 780 (1995) (O'Connor, J., concurring in part & concurring in the judgment). But it is quite another thing to charge the observer with familiarity with the Federal Supplement. If the display has the impermissible effect of endorsing religion, then it violates the Establishment Clause regardless of whether a lawyer brings suit. And if the display does not have that effect, then litigation—whether precedent or subsequent—cannot change that. *Lynch*, 465 U.S. at 684-685. Litigants cannot, simply by bringing suit, bootstrap an otherwise constitutional display into an unconstitutional establishment of religion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2004

APPENDIX

Alabama: A small plaque of the Ten Commandments hangs inside the State Capitol. See National Briefs, Miami Herald at 19 (Sept. 10, 2003), *available at* 2003 WL 62530915.

Alaska: The city council chambers in Fairbanks has a depiction of the Ten Commandments. http://atheism.about.com/b/a/074472.htm?terms=fairbanks.

Arizona: A monument of the Ten Commandments sits on state park land in Wesley Bolin Plaza, just east of the Arizona state capitol in Phoenix. See Arizonans to Rally for Ten Commandments; Hundreds Expected to Gather, Pray to Call for an End to Judicial Tyranny, U.S. Newswire (Sept. 22, 2003), *available at* 2003 WL 55662538.

Arkansas: The Ten Commandments are posted in a courtroom in Maumelle County. See Maumelle candidates fail to leap out front, Arkansas Democrat Gazette at 17 (Nov. 3, 2004), *available at* 2004 WL 96720618.

California: There is a depiction of Moses holding the Ten Commandments over the western entrance to the Los Angeles Superior Court. See http://mayitpleasethecourt.net/journal.asp?blogId=33; http://www.heydaybooks.com/public/books/ccreview1.html.

Colorado: There is a Ten Commandments monument on the lawn of the State Capitol in Denver. There is a similar monument on the lawn in front of city hall in Grand Junction. See http://www.casperstartribune.net/articles/2003/10/28/news/casper/7a6415c2e299679a2c564c072113f7e6.txt.

Delaware: A framed copy of the Ten Commandments hangs on the wall in the council chamber in the Sussex County administrative office building.

District of Columbia: Both the United States Court of Appeals for the District of Columbia Circuit and the

Supreme Court have Ten Commandments displays in their courtrooms. The National Archives has a display of the Ten Commandments on the floor of its entryway. See Affidavit of David Barton, *Doe* v. *Harlan Cty Sch. Dist.*, Civ. No. 99-508 (E.D. Ky. 2001), *available at* http://wallbuilders.com/resources/search/detail.php?ResourceID=41. Displays also appear in the U.S. Capitol and the Ronald Reagan International Trade building.

Florida: In the lobby of the Polk County Administrative Building is a 7-foot, 6-inch monument depicting the Ten Commandments and other documents. See http://www.thomasmore.org/news.html?NewsID=121.

Georgia: The seal of the clerk of the Superior Court in Richmond County contains an outline of the Ten Commandments. See *King* v. *Richmond County*, 331 F.3d 1271 (11th Cir. 2003). The courthouses in Barrow County and Hart County have framed copies of the Ten Commandments outside their courtrooms. See Across Georgia, Augusta Chron. at B03 (Nov. 8, 2004), *available at* 2004 WL 96282513.

Idaho: The City of Post Falls has a monument on the lawn in front of its City Hall. There appear to be monuments bearing the Ten Commandments on the lawn on the eastside of the courthouse in Coeur d'Alene and in a park near the City Hall in Hayden. See Erica Curless, Commandments abound in Idaho; Low-key monuments in public spaces seem unlikely to inspire lawsuits, The Spokesman-Review, at A1 (Sept. 2, 2003), *available at* 2003 WL 57389325.

Illinois: There is a mural in the State Supreme Court library that depicts stone tablets with Hebrew written on them.

Indiana: The Washington County courthouse has a display of the Ten Commandments.

Iowa: There is a monument of the Ten Commandments in a plaza by the city hall in Cedar Rapids.

Kansas: There is a stone monolith in front of a municipal building in Junction City. See http://www.kstatecollegian.com/article. php?a=3321.

Kentucky: Displays at issue in this case.

Louisiana: A framed copy of the Ten Commandments hangs on the wall of an East Baton Rouge Parish courtroom. The Week In Review, Baton Rouge Advoc. 4B (Aug. 31, 2003), *available at* 2003 WL (225) 389-3950.

Maine: There is a mural depicting Moses carrying stone tablets in the district court in Rumford, Maine.

Maryland: There is a monument on the courthouse lawn in Cumberland, Maryland. See http://www.inthefaith.com/archive/001451.php; http://www.showmenews.com/2004/Oct/20041023Feat004.asp. There is also a monument in a park in Frederick. http://www.demossnewspond.com/aclj/releases/2004%20Releases/10 command011604.htm.

Massachusetts: There is a depiction in the central panel of a frieze on the north wall in the Boston public library. See http://www.sargentmurals.bpl.org/site/murals/24_description. html last visited (Nov. 24, 2004).

Minnesota: There is a bronze plaque bearing the Ten Commandments on the entrance to the Crow Wing County courthouse in Brainerd. http://www.mfc.org/contents/article.asp?id=1123.

Mississippi: There is a statue of Moses holding the Ten Commandments atop the Hinds County Courthouse. See http://home.millsaps.edu/~beckea/Buildings2.html.

Missouri: There is monument of the Ten Commandments on the grounds of the State Capitol in Jefferson City. See http://atheism.about.com/b/a/021266.htm.

Montana: There is a granite monolith bearing the Ten Commandments on the capitol grounds in Helena. See http://www.helenair.com/articles/2004/09/22/montana/a01092 204_ 04.txt.

Nebraska: There is a depiction of the Ten Commandments on a light fixture in the chamber of the State Supreme Court. See http://court.nol.org/tour/tour.htm. On the outside of the state capitol in Lincoln is a relief showing Moses carrying the Ten Commandments. See http:// www.wilhelm-aerospace.org/Architecture/modern/art-deco/ nebraska-capitol/ten-commandments.JPG. Fremont has a monument of the Ten Commandments in a public park. www.journalstar.com/articles/ 2004/02/19/local/10045545.txt.

Nevada: There is a stone sculpture bearing the Ten Commandments in the Lovelock Courthouse. There is also a displayed at a senior center owned by the City of Las Vegas.

New Jersey: There is a Ten Commandments monument in a public park in Trenton.

New Mexico: A monument of the Ten Commandments sits on the lawn in front of the Curry County courthouse in Clovis, New Mexico. See Curry Courthouse Displays Commandments Monument, http://amarillo.com/stories/082903/ usn_currycourthouse.shtml; Sanford Brickner, Know Your Rights: Court Case Spotlights Religious Liberty, Santa Fe New Mexican C3 (Sept. 5, 2003), *available at* 2003 WL 57263786.

New York: A state courthouse in Brooklyn has a carved medallion on the facade depicting Moses carrying the commandments. http://www.courts.state.ny.us/history/elecbook/ 2ddept/pg13.htm.

North Carolina: The back wall of the main courtroom in the Haywood county courthouse has a sculpture of the Ten

Commandments. *Suhre* v. *Haywood County*, 55 F. Supp. 2d 384 (W.D.N.C. 1999).

North Dakota: There is a monument bearing the Ten Commandments in a public plaza in Fargo. See http://news.minnesota. publicradio.org/features/2004/10/12_ap_tencommandments. A monument of the Ten Commandments sits outside the Morton County Courthouse in Manden, North Dakota. http:// www.kqcd.com/showNews.asp? whatStory=2137.

Ohio: There is a monument of the Ten Commandments outside the Lucas County courthouse in Toledo. See http:// www.aclu.org/ReligiousLiberty/ReligiousLiberty.cfm?ID= 16102&c=38.

Oklahoma: There is a monument of the Ten Commandments on the lawn of the Haskell County courthouse. See http:// www.amarillo.com/stories/111004/usnten.shtml.

Pennsylvania: The Ten Commandments appears in a mural in the Pennsylvania Supreme Court courtroom in Harrisburg. See Jonathan Gelb, Commandment Fight Expands to Chester County's Web Site, Phila. Inquirer, at B7 (Feb. 26, 2003); see also http://www.slate.com/id/2075609/ slideshow/2075609/fs/0//entry/2075617/. Both the Allegheny County courthouse and the Chester County courthouse have plaques of the Ten Commandments on their facades. See *Modrovich* v. *Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004); *Freethought Soc'y of Greater Philadelphia* v. *Chester County*, 334 F.3d 247 (3d Cir. 2003); see also http://www. post-gazette.com/localnews/ 20030627plaquereg4p4.asp.

Tennessee: A plaque bearing the Ten Commandments hangs on the outside of the Washington County courthouse. See Melanie B. Smith, A busy time for the Big 10: Ten Commandments courthouse controversy not solely in Alabama, The Decatur Daily (Aug. 30, 2003). There is also a plaque containing the Ten Commandments in the foyer of the

Sullivan County courthouse, *ibid.*, and there is a framed copy of the Ten Commadments in the foyer of the Monroe County Courthouse, *ibid.* We have been advised that courthouses in approximately 45 of the 95 counties in Tennessee have similar displays.

Texas: There is a monument of the Ten Commandments on the state capitol grounds. See *Van Orden* v. *Perry*, 351 F.3d 173 (5th Cir. 2003).

Utah: There is a monument of the Ten Commandments in a public park in Pleasant Grove. See http://www.thomasmore.org/news.html?NewsID=214.

Washington: A monument of the Ten Commandments sits on the lawn in front of the police department in Everett, Washington. See BC-Washington Digest, Can. Press (July 24, 2003), *available at* 2003 WL 60142300; see also Ten Commandments: North News, Seattle Post-Intelligencer, at B1(June 2, 2001), *available at* 2001 WL 3560440.

West Virginia: A plaque of the Ten Commandments hangs on a wall in one of the courtrooms in the Clay County courthouse. See http://www.afa.net/clp/ReleaseDetail.asp?id=75.

Wisconsin: The City of La Crosse has a monument of the Ten Commandments in Cameron park. See http://www.lacrossetribune.com/articles/2003/07/15/news/00lead.txt.

Wyoming: Cheyenne has a monument of the Ten Commandments in a public park. See www.billingsgazette.com/index.php?id=1&display=rednews/2003/11/25/build/wyoming/42-cheyennetencommandments.inc.

(6)

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 03-1693

IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, ET AL.,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE STATES OF ALABAMA, FLORIDA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, OHIO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, AND WYOMING, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Sup. Ct. R. 37.4, the *amici* States respectfully submit this brief in support of Petitioners and urge reversal of the Sixth Circuit's judgment.

INTEREST OF *AMICI CURIAE*

Like Petitioners in this case, the State of Alabama has "Foundations of Our Law" displays in its Capitol and its Judicial Building. Alongside the Ten Commandments, Alabama's displays include: (i) the Code of Justinian; (ii) the Magna Carta; (iii) the Mayflower Compact; (iv) the Declaration of Independence; (v) the United States Constitution; (vi) the Bill of Rights; (vii) the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution; and (viii) brief commentary. *See, e.g.*, Ala. Jud. Sys., *Alabama Judicial Building Tour, Foundations of Our Law–Rotunda Display*, at http://www.judicial.state.al.us/tour_display.cfm (last visited Dec. 1, 2004) (including photographs and HTML version of Judicial Building display).

The other *amici* States (or local governments within them) likewise display the Ten Commandments in a variety of ways—as do various entities within the Federal Government, including this Court. Given the long history and prevalence of Ten Commandments displays on public property, the *amici* States have a keen interest in seeing such displays upheld as constitutional.

SUMMARY OF ARGUMENT

Depictions of the Ten Commandments are a common feature of public life in the United States. Such displays—whether exhibited as symbols, monuments, plaques, or documents—date back at least to the 1870s, and there are today (literally) thousands of them across the country. The displays are particularly common at seats of government, and are perhaps most often found in and around courthouses. Indeed, this Court's own building contains more than a dozen depictions of the Commandments. The history and ubiquity of displays on public property involving religious themes in general, and the Ten Commandments in particular, merely confirm this Court's observation that "[t]here is an unbroken history"—here, going back some 130 years—"of official acknowledgment by all three branches of government of the role of religion in American life . . . ." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984).

Although the displays challenged in this case satisfy both the "*Lemon* test," *see Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971), and the "endorsement test," *see County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chap.*, 492 U.S. 573, 592–94 (1989), the *amici* States respectfully submit that this case should be analyzed under the "coercion test" articulated by Justice Kennedy in *Allegheny*, *id.* at 659 (Kennedy, J., concurring in judgment in part and dissenting in part). Under the coercion test, "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678); *see also Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000).

The *Lemon* test has spawned confusion in the lower courts—and worse, has engendered hostility toward religion. The coercion test better represents the Framers' understanding of religious establishments and our Nation's historic practices by properly focusing on government compulsion in religious matters.

When judged (i) against the history and ubiquity of public displays featuring religious symbols generally and displays of the Ten Commandments in particular, and (ii) in the light of the utter absence of governmental coercion, it is apparent that Petitioners' historic-documents displays do not violate the Establishment Clause. Rather, the displays represent a constitutional acknowledgment of religion's indisputably important role in American life and history. Indeed, at the end of the day, the result here is the same whether the case is analyzed under the coercion test, the endorsement test, or even under *Lemon* itself.

ARGUMENT

I. THE TEN COMMANDMENTS HAVE LONG BEEN DISPLAYED ON PUBLIC PROPERTY THROUGHOUT THE NATION.

As Justice Holmes famously observed, frequently "a page of history is worth a volume of logic." *N.Y. Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). So it is that many of this Court's Establishment Clause cases have involved a detailed examination of history. *See, e.g.*, *Engel* v. *Vitale*, 370 U.S. 421, 425–36 (1962); *McGowan* v. *Maryland*, 366 U.S. 420, 431–43 (1961); *Everson* v. *Bd. of Educ. of Ewing*, 330 U.S. 1, 8–16 (1947). Likewise, here, the long history of depictions of religious symbols, including the Ten Commandments, on public property bears directly on the questions presented in this case. *See, e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2323–24 (2004) (O'Connor, J., concurring in the judgment) (emphasizing "history and ubiquity" of challenged practice); *Marsh* v. *Chambers*, 463 U.S. 783, 786–92 (1983) (emphasizing historical pedigree of legislative prayer).[1]

The Ten Commandments have aptly been called "the most influential law code in history." John T. Noonan, Jr., *The Believer and the Powers that Are* 4 (1987). It is not surprising, then, that depictions of the Ten Commandments are a common feature of public (not to mention private) life in the United States. Public displays of the Ten Commandments—whether exhibited as symbols, monuments, plaques, or documents—date back at least to the 1870s. *See, e.g.*, *King* v. *Richmond County*, 331 F.3d

[1] Inasmuch as Indiana's brief for the *amici* States in *Van Orden* v. *Perry*, No. 03-1500, addresses public displays and monuments featuring religious symbolism generally, this brief will focus on public monuments and displays featuring the Ten Commandments in particular.

1271, 1273–74 (11th Cir. 2003) (superior court seal depicting Ten Commandments and sword used at least since 1872); *Modrovich* v. *Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004) (bronze plaque containing Ten Commandments donated to county in 1918); *Freethought Soc'y of Greater Philadelphia* v. *Chester County*, 334 F.3d 247, 249 (3d Cir. 2003) (bronze plaque donated to county in 1920). Such displays, and particularly monuments, are, to put the matter plainly, all over the place—thanks in part to the fact that "as many as 4,000 Ten Commandments monoliths were erected in public spaces across the country" during the 1950s and 1960s by the Fraternal Order of Eagles. Jess Bravin, *When Moses' Laws Run Afoul of the U.S.'s, Get Me Cecil B. deMille*, Wall St. J., Apr. 18, 2001, at A1 (describing campaign to donate Ten Commandments monuments in connection with deMille's 1956 movie, *The Ten Commandments*).

Ten Commandments displays are particularly common at seats of government and courthouses around the country. For example, Ten Commandments monuments (donated by the Fraternal Order of Eagles) stand in the state capitol complexes in Colorado and Texas. *See Van Orden* v. *Perry*, 351 F.3d 173, 175–76 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004) (No. 03-1500); *State* v. *Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1015–16 (Colo. 1995), *cert. denied*, 516 U.S 1111 (1996). Likewise, a mural in the chamber of the Supreme Court of Pennsylvania depicts Moses carving a tablet, with the Ten Commandments listed below. *See* Pa. Unified Jud. Sys., *Supreme Court Photo Gallery*, http://www.courts.state.pa.us/index/Supreme/photogallery9.asp (last visited Dec. 7, 2004). Similarly, the old federal "district courthouse in Cleveland . . . is adorned with a large, magnificent mural of the Ten Commandments flanked by angels." *American Civil Liberties Union of Ohio Found., Inc.* v. *Ashbrook*, 375 F.3d 484, 506 (6th Cir. 2004) (Batchelder,

J., dissenting). And the ceremonial courtroom in the Birch Bayh Federal Courthouse in Indianapolis also contains a mural depicting (among other things) Moses holding the Ten Commandments. *See* Sarah Evans Barker, *The Rule of Law*, 15 Traces 3 (Summer 2003) (including photograph showing the Ten Commandments); *see also Suhre* v. *Haywood County*, 55 F. Supp. 2d 384, 385–86 (W.D.N.C. 1999) (describing marble plaques of the Ten Commandments on either side of sculpture of Lady Justice in county courthouse in western North Carolina).

So, too, in Washington, D.C., depictions of the Ten Commandments seem to be around every corner. A statue of Moses holding the Ten Commandments adorns the rotunda of the Library of Congress. There is a statue representing "Liberty of Worship" resting on the Ten Commandments outside the Ronald Reagan Building and International Trade Center. Outside the E. Barrett Prettyman Federal Courthouse there is a depiction of the Decalogue on tablets with Hebrew writing. And, of course, the Supreme Court building itself contains several Commandments displays. *See* Carrie Devorah, *God in the Temples of Government*, Human Events, Nov. 24, 2003, at 20; Carrie Devorah, *God in the Temples of Government: Part II*, Human Events, Dec. 22, 2003, at 14.

In this Court's building, depictions of the Ten Commandments abound. Moses is portrayed in the frieze on the south wall of the Courtroom "holding two overlapping tablets, written in Hebrew" on which "Commandments six through ten are partially visible." Office of the Curator, Supreme Court of the U.S., *Courtroom Friezes: North and South Walls Information Sheet* 1, http://www.supremecourtus.gov/about/north&southwalls.pdf (updated Aug. 18, 2000). Moses is again represented holding two tablets in the East Pediment. *See* Office of the Curator, Supreme Court of the U.S., *The East Pediment Information Sheet* 1, http://www.supremecourtus.gov/about/eastpediment.pdf

(updated Aug. 18, 2000). The tablets are depicted beside a profile of Moses in eight metopes in the Great Hall. *See* Office of the Curator, Supreme Court of the U.S., *Exterior Portrait Medallions and the Great Hall Metopes Information Sheet* 2, http://www.supremecourtus.gov/about/medallions&metopes.pdf (updated Sept. 17, 2003). And finally, images of the Ten Commandments as two rectangular tablets with curved tops and Roman numerals I–X "appear on the support frame of the Courtroom's bronze gates . . . ; on the lower, interior panels of the Courtroom doors; and held by the figure representing 'Law' in the Library woodwork." Office of the Curator, Supreme Court of the U.S., *Symbols of Law Information Sheet* 2, http://www.supremecourtus.gov/about/symbolsoflaw.pdf (updated May 23, 2002).

It goes without saying, of course, that these displays are not efforts to proselytize or indoctrinate. Rather, according to this Court's Curator, they serve an important secular purpose:

> Throughout the history of western art, tablets have been used to signify "the Law." This tradition is closely associated with Moses, the Hebrew lawgiver, who according to the Book of Exodus descended from Mount Sinai with two stone tablets inscribed with the Ten Commandments. Over time, the use of two tablets has become a symbol for the Commandments, and more generally, ancient laws. Tablets signify the permanence of the law when "written in stone."

Id.

The longstanding tradition and current ubiquity of displays on public property involving religious themes in general, and the Ten Commandments in particular, further confirm this Court's observation that "[t]here is an unbroken history"—here, dating back some 130 years—"of

official acknowledgment by all three branches of government of the role of religion in American life . . . ." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). "This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause" and "ha[s] refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.' " *Id.* at 678 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 671 (1970)) (emphasis in *Lynch*). In short, "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chap.*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

As Justice Kennedy observed in *Allegheny*, a workable and defensible Establishment Clause test "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.* "A test . . . that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the [Establishment] Clause." *Id.* Whatever standard the Court chooses to apply in this case, the longstanding tradition of public displays of the Ten Commandments should be upheld as a permissible "acknowledgment . . . of the role of religion in American life." *Lynch*, 465 U.S. at 674.

II. THE COURT SHOULD ABANDON THE "*LEMON* TEST," AND, AT LEAST FOR DISPLAY CASES, APPLY THE "COERCION TEST."

Both the district court and the court of appeals analyzed this case under the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Under the "*Lemon* test," a statute or government activity must: (i) "have a secular . . . purpose"; (ii) have a "principal or primary effect . . .

that neither advances nor inhibits religion"; and (iii) "not foster 'an excessive government entanglement with religion.' " *Id.* at 612–13 (citation omitted) (quoting *Walz*, 397 U.S. at 674). The court of appeals treated the "endorsement test," *see Allegheny*, 492 U.S. at 592–94, as a refinement of the second, "effects prong" of *Lemon*. *Am. Civil Liberties Union of Ky.* v. *McCreary County*, 354 F.3d 438, 446 (6th Cir. 2003).

Although the displays challenged in this case satisfy both the *Lemon* test and the endorsement test, *see infra* at 20–24, the *amici* States respectfully submit that this case should be analyzed under the "coercion test" articulated by Justice Kennedy in *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part). *See also Lee* v. *Weisman*, 505 U.S. 577, 587 (1992); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000). As its name implies, the coercion test focuses on government coercion or compulsion in matters of religion, which one leading scholar (and now judge) has called "the lost element of establishment" as the Founders understood that legal concept. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

A. The *Lemon* Test Has Engendered Confusion in the Lower Courts and Hostility Toward Religion.

In deciding Establishment Clause cases, it has become an "almost obligatory observation that the *Lemon* test is often maligned." *Glassroth* v. *Moore*, 335 F.3d 1282, 1295 (11th Cir.), *cert. denied*, 124 S. Ct. 497 (2003). A majority of the Members of this Court have led or joined in criticism or disapproval of the *Lemon* test at one time or another. *See Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–400 (1993) (Scalia, J., joined by Thomas, J., concurring in judgment); *Allegheny*,

492 U.S. at 655–57 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 346–49 (1987) (O'Connor, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U.S. 38, 107–13 (1985) (Rehnquist, J., dissenting). The test itself has been likened to a "ghoul," *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in judgment), whose "career in the decisional law of this Court" has been "checkered," *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 319 (Rehnquist, C.J., dissenting), and whose application is a "sisyphean task." *Committee for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

Unfortunately, the *Lemon* test "has simply not provided adequate standards for deciding Establishment Clause cases." *Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting). As Judge McConnell has observed—

> Each part of the *Lemon* test is deeply ambiguous, and each—if taken literally—would produce highly unattractive results. Consequently, the lower federal courts and state courts have given the test widely different and seemingly contradictory interpretations, and they often ignore it altogether to avoid undesirable results.

Michael W. McConnell, *Stuck with a Lemon: A New Test for Establishment Clause Cases Would Help Ease Current Confusion*, 83 A.B.A. J. 46, 46 (1997). "The result of [the *Lemon* test's] three ambiguous principles is a jurisprudence of confusion and inconsistency—with a heavy dose of hostility to religion thrown in." *Id.* at 47.

Particularly problematic is the *Lemon* test's "secular purpose" prong—which lies at the heart of this case. Indiana's brief for the *amici* States in *Van Orden* v. *Perry*, No. 03-1500, addresses the difficulties with the purpose prong at some length; thus, *amici* do so only briefly here.

As then-Justice Rehnquist observed in *Wallace* v. *Jaffree*, the purpose prong "has proven mercurial in application because it has never been fully defined, and [the Court] never fully stated how the test is to operate." 472 U.S. at 108 (Rehnquist, J., dissenting). Legal scholars have agreed that "[i]t is not entirely clear what 'secular legislative purpose' means." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2206 n.613 (2003). Equally troublesome, the purpose prong is unfaithful to our history, because the proponents of disestablishment frequently gave "religious or theological justifications for their position,"[2] leading Judge McConnell to ask whether disestablishment itself "[s]hould ... be faulted for reliance on a 'nonsecular purpose[.]' " *Id.* at 2206.

Given the difficulties inherent in the *Lemon* test, this Court has understandably declined to follow it consistently. In *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973), the Court called the *Lemon* criteria "no more than helpful signposts." In *Larson* v. *Valente*, 456 U.S. 228 (1982), and

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[2] Judge McConnell cites Thomas Jefferson's Bill for Establishing Religious Freedom. McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2206 & n.615. Among the first justifications for religious freedom offered in that Bill was "that Almighty God hath created the mind free." Thomas Jefferson, A Bill for Establishing Religious Freedom para. 1 (1779) *in* 5 *The Founders' Constitution* 77, 77 (Philip B. Kurland & Ralph Lerner eds. 1987). Another was "[t]hat all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do ...." *Id.*

Marsh v. *Chambers*, 463 U.S. 783 (1983), the Court ignored *Lemon* altogether. *See Lynch*, 465 U.S. at 679 ("In two cases, the Court did not even apply the *Lemon* 'test.' ") (citing *Marsh* and *Larson*). In *Lynch*, the Court even went "so far as to state that [the *Lemon* test] has never been binding on us." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 319 (Rehnquist, C.J., dissenting) (citing and quoting *Lynch*, 465 U.S. at 679). And in *Lee* v. *Weisman*, the Court likewise "mentioned, but did not feel compelled to apply, the *Lemon* test." *Id.* at 320. However much maligned, though, the *Lemon* test seemingly lives on, being irregularly invoked by the Court—most recently in *Santa Fe Independent School District* v. *Doe*, 530 U.S. at 314. *See also Lamb's Chapel*, 508 U.S. at 395 n.7 ("*Lemon*, however frightening it might be to some, has not been overruled").

Given the confusion and ambiguity that the *Lemon* test has engendered—not to mention the ceaseless litigation hostile to religion that the test's vagaries have fueled—the *amici* States respectfully suggest that the time has come simply to abandon it.[3]

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[3] At a minimum, the Court should take this opportunity to clarify *Lemon*'s purpose prong. In *Board of Education of Westside Community Schools* v. *Mergens*, 496 U.S. 226 (1990), a plurality of the Court suggested that there is a distinction between purpose and motive under the purpose prong of *Lemon*: "Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Id.* at 249 (plurality opinion). The Court has never explicitly endorsed that distinction, however, or explained how to apply it.

Given the facts of this case, it is also worth noting that "*a* secular purpose . . . is all that *Lemon* requires," not an "exclusively secular" purpose. *Lynch*, 465 U.S. at 681 n.6 (emphasis added); *Jaffree*, 472 U.S. at 56 ("a statute that is motivated in part by a religious purpose may satisfy the first [*Lemon*] criterion"). It likewise bears emphasis that "a court has no license to psychoanalyze the legislators" or decisionmakers. *Id.* at 74 (O'Connor, J., concurring in judgment).

B. The "Coercion Test" Better Represents the Framers' Intent and Our Nation's Historic Practices.

In *Allegheny*, a case (not unlike this one) involving holiday displays featuring religious objects, Justice Kennedy proposed what has come to be called the "coercion test." After recognizing that "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society," 492 U.S. at 657 (citing *Lynch* 465 U.S. at 678), Justice Kennedy addressed the limits that the Clause places on such recognition and accommodation of religion:

> The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to ob-

> servance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

Id. at 659–60 (citation omitted) (quoting *Lynch*, 465 U.S. at 678).

Three years later, the Court adopted Justice Kennedy's formulation of the coercion test in *Lee* v. *Weisman*:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678). The Court has since applied the coercion test in *Santa Fe Independent School District* v. *Doe*, 530 U.S. at 302 (quoting *Lee*, 505 U.S. at 587).

The coercion test best captures the Framers' understanding of (i) what constituted an "establishment of religion" as that term is used in the First Amendment and (ii) a principal evil to be avoided by prohibiting such an establishment. The writings of James Madison, George Mason, and Thomas Jefferson suggest that all of them viewed the elimination of government coercion or compulsion as being at the heart of religious freedom.

As this Court has noted, during debate on the religion clauses in Congress in 1789, James Madison, the measures' sponsor,

> said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce* the legal observation of it *by law*, nor

> *compel* men to worship God in any manner contrary to their conscience. * * * He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform.

McGowan, 366 U.S. at 441 (internal quotation marks omitted) (quoting 1 Annals of Cong. 730–31 (1789)) (emphasis added). Madison's earlier Memorial and Remonstrance Against Religious Assessments likewise targeted government compulsion in religious matters, asserting as "a fundamental and undeniable truth, 'that Religion . . . can be directed only by reason and conviction, *not by force or violence*.'" James Madison, Memorial and Remonstrance Against Religious Assessments 1 (1785) (quoting Va. Decl. of Rights § 16 (1776)), *in* 5 *The Founders' Constitution* 82 (Philip B. Kurland & Ralph Lerner eds. 1987) (emphasis added).

Madison's Memorial and Remonstrance relied, in turn, on the Virginia Declaration of Rights for the proposition that religious belief should not be coerced. In his first draft of the religion clause of the Declaration of Rights, George Mason—later a leading proponent of a bill of rights for the Federal Constitution—likewise denounced government compulsion in religious matters:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be governed only by Reason and Conviction, *not by Force or Violence*; and therefore that all Men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, *unpunished and unrestrained by the Magistrate*, unless, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals. And

> that it is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards Each other.

George Mason, First Draft of the Virginia Declaration of Rights (1776), *in* 1 *The Papers of George Mason* 276, 278 (Robert A. Rutland ed., 1970) (emphasis added).[4] As finally adopted, the religion clause of the Declaration of Rights retained Mason's original denunciation of "force or violence" in religious matters. *See* Va. Decl. of Rights § 16 (1776), *in* 5 *The Founders' Constitution* 70. Madison used this condemnation of government compulsion in religious matters (which might otherwise be mistaken as relating only to free exercise) to attack religious tax assessments, a hallmark of establishment.

Thomas Jefferson likewise condemned government compulsion in religious matters. According to Jefferson, "[co]mpulsion in religion is distinguished peculiarly from compulsion in every other thing." That he said, is because "I may grow rich by art I am compelled to follow, I may recover health by medicines I am compelled to take agt. my own judgmt., but I cannot be saved by a *worship* I disbelieve & abhor." Thomas Jefferson, Notes on Locke (1776), *in* 1 *The Papers of Thomas Jefferson* 544, 547 (Julian P. Boyd ed., 1950) (based on John Locke, *A Letter Concerning Toleration* (1689)). Jefferson's famous Bill for Establishing Religious Freedom focused on eliminating government coercion in religious matters so "that no man shall be *compelled* to frequent or support any relig[i]ous Worship place or Ministry whatsoever, nor shall be *enforced*, *restrained*, *molested*, or *burthened* in his body or goods, nor shall otherwise *suffer* on account of his religious opinions or belief . . . ." Thomas Jefferson, A Bill for Establishing Religious Freedom para. 2 (1779), *in* 5 *The Founders' Constitution* 77 (emphasis added). Jefferson's thinking was based in part on observations that "the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by *coercions* on either, as was in his Almighty power to do" and "[t]hat to *compel* a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." *Id.* para. 1 (emphasis added). These references to compulsion and coercion were retained when the Bill was adopted in 1786. *See* Act for Establishing Religious Freedom (1786), *in* 5 *The Founders' Constitution* 84, 84; *cf.* Letter from Thomas Jefferson to James Madison (June 9, 1798) *in* 30 *Papers of Thomas Jefferson* 393, 393 (Barbara B. Oberg ed., 2003) ("[T]hey have brought into the lower house a sedition bill, which among other enormities, undertakes to make printing certain matters criminal, tho' *one of the amendments to the Constitution has so expressly taken religion, printing presses &c. out of their coercion.*") (emphasis added).

[4] Later paragraphs in the first draft are in Thomas Ludwell Lee's handwriting, but the excerpt reprinted above was written by Mason. 1 *The Papers of George Mason* at 279.

Two caveats are in order. First, these statements by Madison, Mason, and Jefferson indicate that the principal evil targeted by the Establishment and Free Exercise Clauses was government coercion through actual (*i.e.*, physical or legal) compulsion in religious matters. That is, the kind of coercion the Framers contemplated apparently involved actions that would truly "compel" religious belief, practice, or financial support with "force," "violence," or "law." *See also Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*"); *cf.* Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808) *in* 5 *The Founders' Constitution* 98, 98–99 (including as potential penalty for

failing to observe a day of fasting and prayer "some degree of proscription perhaps in public opinion"). Having said that, the question of precisely what kind of government conduct or influence constitutes impermissible coercion—*e.g.*, whether actual or psychological—need not divide the Court here as it did in *Lee*. Whether the concept of unconstitutional coercion properly includes psychological or peer pressure, *see Lee*, 505 U.S. at 593–94, or not, *see id.* at 640–44 (Scalia, J., dissenting), that kind of pressure is plainly absent in this case. As detailed below, *see infra* at 19–20, the inanimate displays in this case are entirely passive, involve no religious ceremony, and entail no "captive audience."

Second, the *amici* States do not contend that the coercion test is a "one-size-fits-all" solution to Establishment Clause problems. The Court has already eschewed "any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679. As Justice O'Connor has observed, "the Establishment Clause . . . cannot easily be reduced to a single test," because "[t]here are different categories of Establishment Clause cases, which may call for different approaches." *Bd. of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment). *Amici*'s point is simply that, in the context of public displays involving religious symbols, the coercion test best distinguishes permissible acknowledgment and accommodation from impermissible establishment. Accordingly, the coercion test should provide the frame of reference for this case.

III. THE DISPLAYS IN THIS CASE DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

When judged (i) against the history and ubiquity of public displays featuring religious symbols generally and displays of the Ten Commandments in particular, and (ii)

in the light of the utter absence of governmental coercion, it is evident that the historic-documents displays in this case do not violate the Establishment Clause. Indeed, a reversal should follow not only under the coercion test, but under the endorsement and *Lemon* tests, as well.

A. Petitioners' Displays Satisfy the Coercion Test.

As noted above, public displays of the Ten Commandments—whether as symbols, plaques, or monuments—date back well over a century. There are now (literally) thousands of such displays across the country. The long history and prevalence of these displays at courthouses and seats of government suggest that the Decalogue is displayed not to impose or advance some religious establishment, but instead merely to acknowledge the significant role that religion has indisputably played in shaping this Nation's law and government. In addition, as this Court's Curator's explanation suggests, *see supra* at 7, the Ten Commandments are an immediately recognizable ancient legal text, and are thus an appropriate symbol for ancient law generally. The displays in this case, moreover, are presented as only one part of a collection of historically significant documents and images, further underscoring the Commandments' historic—as opposed to religious—significance.

There is also no hint of government coercion—however defined—in Petitioners' displays. First, the displays are entirely passive; they hang on a wall to be viewed or ignored at a passerby's option. Second, no one is invited, much less coerced, to participate in any kind of religious ceremony; there are no organized prayers, hymns, or the like associated with the displays. Finally, there is no "captive audience" problem, as may sometimes be the case in other settings; again, courthouse visitors are free to ignore the displays entirely. The absence of government

coercion, combined with the history and ubiquity of similar Ten Commandments displays, renders the displays in this case permissible under the Establishment Clause.

B. Petitioners' Displays Satisfy the Endorsement Test.

As noted above, the result should be the same even under the endorsement or *Lemon* tests. As for endorsement, Justice O'Connor has observed more than once that the "history and ubiquity" of a challenged practice is an important consideration under the endorsement test "because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in judgment); *see also Newdow*, 124 S. Ct. at 2323–24 (O'Connor, J., concurring in judgment). A reasonable observer would be particularly unlikely to perceive endorsement in this case—where the Decalogue is displayed as only one of nine documents and symbols, all depicted for their historical significance to the Nation's system of law and government. Indeed, removing the Ten Commandments from such a historical display would communicate a message of hostility—not neutrality—toward religion, which a reasonable observer (who, presumably, would be familiar with the Commandments' removal) surely would not miss.

C. Petitioners' Displays Satisfy the *Lemon* Test.

The court of appeals based its decision striking down the displays in this case not on the presence of coercion or endorsement[5] but, instead, on the presence of what it

[5] Only Judge Clay joined the main opinion's endorsement test analysis.

perceived to be an impermissible religious purpose under the *Lemon* test. The court's faulty purpose-prong analysis underscores just how badly the secular-purpose inquiry has gone off track.

The court of appeals' reasoning was based largely on a misapplication of *Stone* v. *Graham*, 449 U.S. 39 (1980) (*per curiam*), outside the context of public school classrooms. The court's rote application of *Stone* failed to account for the fundamental differences between the schoolhouse and courthouse settings.

In public elementary and secondary schools, this Court has said, "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987). As a result, this "Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Id.* at 583–84. These atmospheric and "coercive power" concerns were heightened in *Stone*, where the posting of the Ten Commandments in a classroom setting functioned "purely as a religious admonition." *Lynch*, 465 U.S. at 679. No such "admonition" is present in this case, however, where both the setting and the manner of display are entirely different.

As the Chief Justice has observed (and, again, as this Court's Curator's explanation confirms, *see supra* at 7), in addition to their obvious religious importance, the Ten Commandments "[u]ndeniably . . . have secular significance as well, because they have made a substantial contribution to our secular legal codes." *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., dissenting from denial of certiorari). Placement of the Ten Commandments in a courthouse or seat of govern-

ment, whether alone or with other historic documents, "emphasizes the foundational role of the Ten Commandments in secular, legal matters." *Id.* Given the secular significance of the Decalogue and the manner in which posting it in a courthouse emphasizes its secular, legal impact, it is clear that Petitioners had a legitimate secular purpose for displaying the Ten Commandments in their courthouses. Certainly, Petitioners' actions were not "motivated wholly by religious considerations," *Lynch*, 465 U.S. at 680, as would be required to find a violation under the purpose prong of *Lemon*. *See also supra* note 3. Under *Lynch* and *Allegheny*, Petitioners' purpose is best understood as a permissible effort to "acknowledg[e] . . . the role of religion in American life." *Lynch*, 465 U.S. at 674.

Further misapplying *Stone*, the court of appeals required that, in order to demonstrate a legitimate secular purpose, "the government must present the Ten Commandments objectively and must integrate them with a secular message," 354 F.3d at 449, by demonstrating an "analytical or historical connection," *id.* at 451, between the Decalogue and other documents in a public display. In *Stone*, however, this Court merely observed that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. As Chief Judge Boggs pointed out, *Stone*'s *dictum* was not "an attempt to state binding limits on all future constitutionally valid displays." *Am. Civil Liberties Union of Ky.* v. *McCreary County*, 361 F.3d 928, 933 (6th Cir. 2004) (Boggs, C.J., dissenting from denial of rehearing en banc). But even if it were, there was nothing in *Stone* to "suggest that a display that includes the Ten Commandments as part of an array containing eight or nine otherwise secular, historical documents, violates

the First Amendment unless the display also provides an explicit analytical or historical connection between the clearly secular and the arguably religious items." *Id.*

As Judge Ryan further demonstrated, *Lynch* did not require an "analytical or historical connection" between the crèche and the "reindeer pulling Santa's sleigh," 465 U.S. at 671, and *Allegheny* did not require an "analytical or historical connection" between the menorah and the Christmas tree. 354 F.3d at 475 (Ryan, J., dissenting). More significantly, he observed, the court of appeals' misapplication of *Stone* would effectively doom most displays with religious symbols because "[g]overnment monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose." *Id.* Accordingly, the test developed by the court of appeals is not only unworkable, but also wholly inconsistent with *Lynch* and *Allegheny*.

Finally, the courts below erred in imputing to Petitioners' current displays an allegedly impermissible purpose underlying earlier displays. "The district court found it 'significant' that [Petitioners'] original displays, containing only the Ten Commandments 'were erected in violation of the Supreme Court's clear ruling in *Stone*.' " 354 F.3d at 457 (quoting *Am. Civil Liberties Union of Ky.* v. *McCreary County*, 145 F. Supp. 2d 845, 849–50 (E.D. Ky. 2001) (footnote omitted)). " 'This defiance,' according to the district court, 'imprinted the defendants' purpose, from the beginning with an unconstitutional taint . . . . ' " *Id.* (quoting 145 F. Supp. 2d at 850 (footnote omitted)). The court of appeals faulted the district court's analysis, which "appeared to afford exclusive weight to [Petitioners'] past conduct without addressing the specific content of the revised displays," but agreed that "the history of [Petitioners'] involvement with the displays strongly indicated that the primary purpose was religious." 354

F.3d at 458; *see also* 361 F.3d at 931 (Clay, J., concurring in denial of rehearing en banc).

As an initial matter, given the differences between the courthouse and schoolhouse settings, even the premise of the district court's "unconstitutional taint" analysis is faulty: It is by no means clear that the original courthouse displays violated *Stone*. But even if Petitioners' original displays were unconstitutional, that should not "taint" forever Petitioners' good-faith efforts to come into compliance. If government is to function, its officials must be allowed to correct their mistakes. They should not labor under an unconstitutional taint of past misconduct while attempting to set matters straight. This is especially true in the field of Establishment Clause jurisprudence, where the line between the permissible and the impermissible is frequently "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," *Lemon*, 403 U.S. at 614, that can only be "dimly perceive[d]," *id.* at 612. In reality, what Petitioners' efforts "strongly indicate[d]" was a bona fide intention to comply with the Constitution.

By misinterpreting *Stone* to fashion its own unprecedented test for Ten Commandments displays, the court of appeals erred in its purpose-prong analysis under *Lemon*. Under this Court's decision in *Lynch*, Petitioners had a legitimate secular purpose—anchoring modern law in ancient sources—for their courthouse displays. This secular purpose, combined with the lack of endorsement of religion and the utter absence of coercion, demonstrates that the displays in this case represented an entirely acceptable and proper "acknowledgment . . . of the role of religion in American life." 465 U.S. at 674.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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December 8, 2004

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Inside Front Cover)

(27)

Supreme Court, U.S.
FILED
JAN 4 - 2005
OFFICE OF THE CLERK

No. 03-1693

In the Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY; LOUANNE WALKER; DAVE HOWE; LAWRENCE DURHAM; PAUL LEE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ATHEISTS IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

American Atheists is a volunteer organization active in protecting the rights of Atheists and promoting tolerance and understanding of the Atheist viewpoint. Founded in 1963 by Madalyn Murray O'Hair,[2] for over thirty years American Atheists has been dedicated to the separation of church and state and a tireless advocate of the Atheist cause.[3] American Atheists' perspective is rooted in the philosophy of materialism, "which holds that nothing exists but natural phenomenon."[4]

> The indestructible foundation of the whole edifice of Atheism is its philosophy, materialism, or naturalism, as it is also known. That philosophy regards the world as it actually is, views it in the light of the data provided by progressive science and social experience.

---

[1] The parties have consented to the filing of this brief. A copy of the letter of consent of the Petitioner and Respondent is included in the Appendix. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Ms. O'Hair founded American Atheists following the United States Supreme Court ruling in School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), overturning the Maryland Court of Appeals' approval of public school bible readings in her case, Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962).

[3] Ms. O'Hair and American Atheists' work includes the founding of the first known Atheist library and archives in the United States, production of American Atheist Forum, the first regularly scheduled television program produced, directed, and broadcast by Atheists, founding of the American Atheist Press, the American Atheist magazine, and the American Atheist Radio Series, and countless other cultural and legal contributions to the Atheist cause.

[4] Madalyn Murray O'Hair, Atheism, American Atheists, at http://www.atheists.org/Atheism/atheism.html (last visited December 9, 2004).

> Atheistic materialism is the logical outcome of scientific knowledge gained over the centuries.[5]

No gods, spirits, fairies, or other imagined entities pull at the strings of humanity. The materialist philosophy of Atheism promotes a positive viewpoint and provides the impetus to effect change.

> Materialism liberates us, teaches us not to hope for happiness beyond the grave but to prize life on earth and strive always to improve it. Materialism restores to man his dignity and his intellectual integrity. Man is not a worm condemned to crawl in the dust, but a human being capable of mastering the forces of nature and making them serve him. Materialism compels faith in the human intellect, in the power of knowledge in man's ability to fathom all the secrets of nature and to create a social system based upon reason and justice. Materialism's faith is in man and his ability to transform the world by his own efforts. It is a philosophy in every essence optimistic, life-asserting, and radiant. It considers the struggle for progress as a moral obligation, and impossible without noble ideals that inspire men to struggle, to perform bold, creative work.[6]

Given American Atheists' unswerving dedication to the Atheist cause for over three decades, American Atheists submits this brief in support of Respondents and urges the Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

---

[5] Id.
[6] Id.

SUMMARY OF THE ARGUMENT

The two courthouse displays of the Ten Commandments among other documents consisting of the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, Lady Justice, (hereinafter "Secularizing Documents"), and a one page prefatory document alleging a foundational role of the Ten Commandments in the Declaration of Independence and our legal tradition, violate the prohibition of the Establishment Clause of the First Amendment that "Congress shall make no law respecting an establishment of religion," as applied to the states through the Fourteenth Amendment. No plausible reason justifies the endorsement and promotion of the sacred text of Judaism and Christianity by including it among the Secularizing Documents other than the endorsement of a particular set of religious beliefs. As a result, the courthouse displays lack a valid secular purpose under the first Lemon prong.

In addition, the lack of a demonstrated relevance of the Ten Commandments to the Secularizing Documents or to any other overarching secular theme is sufficiently likely to be perceived by adherents of the Ten Commandments as an endorsement, and by nonadherents as a disapproval, of their individual religious choices. As a result, the Ten Commandments courthouse displays violate the second prong of Lemon. Amicus curiae American Atheists respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. THE PETITIONERS' DISPLAY OF THE TEN COMMANDMENTS VIOLATES THE VALID SECULAR PURPOSE REQUIREMENT OF THE ESTABLISHMENT CLAUSE REGARDLESS OF ANY ALLEGED SECULAR CONTENT OR CONTEXT.

To satisfy the first prong of Lemon, a challenged statute "must have a secular legislative purpose." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This prong is violated if the statute is "motivated wholly by an impermissible purpose." Lynch v. Donnelly, 465 U.S. 668, 680 (1984). While courts are normally deferential to government's articulation of secular purpose, close examination is important to reveal insincere or sham purposes. Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987). Government action lacks a secular purpose when the primary purpose is a religious one. Id., at 594. This is especially true "[w]hen both courts below are unable to discern an arguably valid secular purpose." Id., n. 15. There is a reluctance to attribute unconstitutional motives to the states when there is "a plausible secular purpose ... discernable on the face of the statute." Meuller v. Allen, 463 U.S. 388, 394-95 (1983). But where a legislature has a pre-eminent religious purpose in enacting a statute, a court need not be blind to that purpose, even where the legislature proffers a secular purpose. Edwards, 482 U.S. 578, 589-590.

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to

> the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice.

Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). "This intention may be evidenced by promotion of religion in general, . . . or by advancement of a particular religious belief." Edwards, 482 U.S. 578, 585. Thus, in addition to insincerity or sham of the stated purpose, the lack of a secular purpose may be found on the face of a statute by the (1) implausibility of the proffered purpose, (2) promotion of religion in general, or (3) advancement of a particular religious belief. In this case, the proffered secular purpose is implausible, promotes religion in general, and advances a particular religious belief.

This Court has already unequivocally determined the religious nature of the Ten Commandments. In Stone v. Graham, 449 U.S. 39 (1980), this court was faced with an "avowed" secular purpose recited in the text of the law requiring their posting on the schoolhouse wall, and in small print at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Id., at p. 40. The Ten Commandments' religious content was held to be unmistakable when this Court held that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths and no legislative recitation of a supposed secular purpose can blind us to that fact." Id., at p. 41. The Court referred to the alleged partial secular content of the Decalogue as merely "arguable":

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Id., at pp. 41-42 (footnote omitted). As a result, this Court in Stone rejected the avowed secular purpose as facially implausible. Id.

The secular purposes for the displays enunciated by Petitioners in the proceedings below consist of (1) to erect a Ten Commandments display consistent with the Establishment Clause; (2) to demonstrate that the Ten Commandments have a foundational role in American law and government; (3) to demonstrate the significance of the Ten Commandments in providing the moral background for the Declaration of Independence and the foundation of our legal tradition; and (4) to educate citizens about the foundational role of the Ten Commandments in the law and government. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 446-447. Petitioners' merits brief articulates several allegedly secular purposes, i.e., "to educate about law," Brief For Petitioners, at p. 5; educating the public about "some documents that played a role in the foundation of our system of law and government," id., at p. 9; the "purpose is … to post a Display about law." id., at p. 10; "The Display is about law, not religion," id., at p. 11; "educating the public

about some of the documents that influenced American Law and government." id., at p. 16.

Because none of the proffered purposes articulated by the Petitioners for the displays of the Ten Commandments are a valid secular purpose, the displays must be invalidated under the first Lemon prong. First, the desire of the Petitioners to comport their conduct with the requirements of the Establishment Clause is not a valid secular purpose under Lemon. Indeed, all government action is required to comport with the law, and the acceptance of this as a valid purpose under the first Lemon prong would render it a nullity.

Second, purposes two, three, and four, proffered in the proceedings below, to demonstrate the foundational role of the Ten Commandments in American law, government, and the Declaration of Independence, also fail the secular purpose test of the first Lemon prong. Because the displays fail to incorporate the Ten Commandments into an overarching secular context, this Court's decision in Stone, supra, is dispositive. In Stone, the Court opined that the Ten Commandments might be a constitutionally acceptable part of a course of study of "history, civilization, ethics, comparative religion, or the like," however, "[p]osting of religious texts on the wall serves no such educational function." 449 U.S. 39, 42 (1980).

An examination of the content of the displays reveals a lack of a nexus between the Ten Commandments and the proffered secular purpose, which is the alleged foundational role of the Ten Commandments in American law, government, and the Declaration of Independence. The contents of the displays reveal no connection between the admonitions contained in the Ten Commandments and the contents of any of the other Secularizing Documents. None

of the Secularizing Documents is related to the portion of the Ten Commandments that specify the religious duties owed to a god. Neither is there any relation between the Ten Commandments' admonitions against dishonoring parents, stealing, killing, bearing false witness, and coveting, on the one hand, and the contents of the Secularizing Documents.

In addition, the foundational role of the Ten Commandments in American law, government, and the Declaration of Independence is likewise unspecified in the record below. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 452-453. Indeed, which law of Kentucky or elsewhere derives from the commandment "Remember the Sabbath day to keep it holy," which presumably includes requiring slave owners to give them a day off? Which laws of Kentucky or elsewhere derive from the commandment that we don't have freedom to express anti-theistic opinions or that we are to not covet our neighbor's wife? Nowhere do the Ten Commandments prohibit slavery, drunken driving, or father-daughter incest. They set no useful health standards, no monetary or judicial criteria, and no social service standards. They are useless in matters of probate, contract law, human/civil rights, and constitutional law. Of the Ten Commandments, four address themselves to how and when to worship the proper gods, and two concern women simply as pieces of property. Nowhere in the Declaration of Independence are there any admonitions found in the Ten Commandments or anything colorably related to them.

Moreover, three of the Ten Commandments are contrary to the United States Constitution thus negating the claim that they are the foundations of our laws. The commandment that "thou shalt have no other gods before me"

is directly contrary to the Establishment Clause of the First Amendment. The commandments that "Thou shalt not make unto thee any graven image," and "Thou shalt not take the name of the LORD thy God in vain" are in direct opposition to the guarantees of freedom of speech and expression in the First Amendment. The first four commandments speak to "pleasing a god." The Declaration Of Independence speaks of just the opposite: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

The Sixth Circuit opinion found it significant that neither the defendants nor the dissent attempted to buttress the historical claim that the Ten Commandments have a foundational role in the law or the Declaration of Independence. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 452. Government action lacks a secular purpose when the primary purpose is a religious one, especially "[w]hen both courts below are unable to discern an arguably valid secular purpose." Edwards, 482 U.S. 578, 594 n. 15. When both courts below have been unable to discern an arguable secular purpose, when the contents of the display fail to show any connection between the Ten Commandments and an arguably secular purpose, and when the proponents of the displays are unable to articulate a nexus between the Ten Commandments and any arguably secular purpose for the displays, this Court must presume that such a nexus and connection does not exist and that there is no secular purpose in including the Ten Commandments in the displays among the Secularizing Documents.

The alleged secular purposes that are proffered in the Brief For Petitioners also fail the Lemon purpose prong for a number of reasons. First, the Petitioners' shifting statements

of the purpose of the displays throughout the course of the proceedings below and in their merits brief, evinces an insincerity of the avowed purposes. By adopting shifting secular purposes Petitioners have cast doubt on their sincerity. Moreover, they have effectively denied the lower courts the opportunity to pass upon their claim under the Lemon purpose prong.

Second, assuming that Petitioners' avowed purpose is to educate about both religious law and secular law under the generic topic of "law," Petitioners' selection of the sacred religious text of the Judeo Christian tradition as the only example of religious law, belies the avowed purpose. Brief for Petitioners, at p. 5 ("The Display is about law and . . . the Decalogue is law"); Id., at p. 11 ("The Display is about law, not religion. The Ten Commandments are law...")

Third, the history of the display casts doubt upon the current avowed purpose. This Court has specifically looked to the history of the challenged government action to determine its purpose. Santa Fe Ind. School Dist. v. Doe, 530 U.S. 290, 315 ("This history indicates that the District intended to preserve the practice of prayer before football games.") The history of the courthouse displays indicates a purpose of inclusion of the Ten Commandments above all, and camouflaging them by inclusion among the Secularizing Documents.

Fourth, the displays also fail this Court's secular purpose prohibitions against promotion of religion in general and advancement of a particular religious belief. Edwards, supra. The displays purport to present the King James Version of the Ten Commandments. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 443 n. 2. Thus, it cannot be denied that the displays promote and advance a

particular religious belief. As a result, the displays' promotion of either religion in general or the advancement of a particular religious belief compels a finding that they lack a valid secular purpose. For the foregoing reasons, the displays at it issue fail the secular purpose prong of Lemon and must be enjoined under the Establishment Clause.

The decision of the United States Court of Appeals for the Sixth Circuit must be affirmed under the first Lemon prong.

II. THE PETITIONERS' DISPLAY OF THE TEN COMMANDMENTS UTTERLY FAILS TO PASS CONSTITUTIONAL MUSTER AS AN ENDORSEMENT OF RELIGION CONSIDERING ITS CONTENT AND CONTEXT.

In evaluating the government's use of religious symbolism under the second Lemon prong, the Supreme Court has held that it "must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" County of Allegheny v. ACLU of Pittsburgh, 492 U.S. 573, 597 (1989).

> A public school's sponsorship of a religious message is impermissible under the establishment of religion clause of the Federal Constitution's First Amendment, because such sponsorship sends (1) the ancillary message to members of the audience who are nonadherents that they are outsiders and not full members of the political community; and (2) an accompanying message to adherents that they are

insiders and favored members of the political community.

Santa Fe Ind. Such. Dist. v. Doe, 530 U.S. 290, 309-310 (2000); See also, County of Allegheny, 492 U.S. 573, 593-597 (1989) (citing Wallace v. Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment)) and Grand Rapids v. Ball, 473 U.S. 373, 389-392 (1985)). The analytical task under County of Allegheny, supra, is to determine whether the religious symbol "in [its] 'particular physical setting[],' has the effect of endorsing or disapproving religious beliefs." County of Allegheny, 492 U.S. 573, 597 (1989).

In Stone, supra, this Court relied upon the lack of the Ten Commandments' integration into the school curriculum in an otherwise secular context for the appropriate secular study of history, civilization, ethics, comparative religion, or the like. Id., at 42. It held that the posting of the texts on the wall "serves no such educational function." Id. Here, although the petitioners attempt to articulate arguably secular purposes for the displays, petitioners make no attempt to explain how the Ten Commandments are related to the purpose of the displays. Indeed, there is nothing obvious in the text of the Ten Commandments that in any way suggests a relation to the Secularizing Documents or to any other overarching secular theme.

Just as this Court held in Stone that posting the text on the school house wall served no educational function, the displays of the Ten Commandments bear no rational relationship to the Secularizing Documents or the proffered secular purposes. Indeed, the placement of the Ten Commandments among the Secularizing Documents indicates that the government places this religious text on a par with the

other indisputably important foundational and historical icons of our government and law. Such an endorsement of what is indisputably an important religious text serves to convey the message to adherents of the Ten Commandments of government endorsement of their religious choices, and to nonadherents of government disapproval of their individual religious choices.

This Court has not adopted the reasonable observer acquainted with the text, legislative history, and implementation of the statute standard of Justice O'Connor's concurrence in Capitol Square, a case involving a government limited forum, for government religious displays. Cf., 515 U.S. 753, 779-780 (O'Connor, J., concurring in part and concurring in judgment) and 515 U.S. 753, 797-807 (Brennan, J., dissenting). Indeed, Justice O'Connor's reasonable observer who is so acquainted standard appears to be mostly impractical of application. How much research must the reasonable observer undertake to discover the legislative or other history of the displays, the rationale for the location of their placement, or the shifting arguably secular purposes proffered by their proponents? Apparently, under Justice O'Connor's reasonable acquainted observer standard, the research must be exhaustive. However, the failure of Justice O'Connor's reasonable observer to have fully acquainted herself with the legislative and other history of a government religious display bears no relationship to the "perce[ption] by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." County of Allegheny, 492 U.S. 573, 597. Indeed, this Court's "adherent/nonadherent" perceptions test for endorsement is the one most consonant with the purposes of the Establishment Clause.

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). Status in the political community should not and does not depend upon conducting the exhaustive research into legislative history and motives that Justice O'Connor's reasonable acquainted observer standard would impose.

As a result, the displays violate the second prong of Lemon and must be enjoined under the Establishment Clause. The decision of the United States Court of Appeals for the Sixth Circuit must be affirmed under the second Lemon prong.

CONCLUSION

The Ten Commandments courthouse displays, because they bear no plausible relationship to the Secularizing Documents or to any overarching secular theme, violate the purpose prong of Lemon. In addition, the displays are lacking in any secular context that would cause a reasonable observer to perceive anything but the government's endorsement or disapproval of the religious beliefs contained in the Ten Commandments. Amicus curiae American Atheists respectfully requests that the United States Court of Appeals for the Sixth Circuit be affirmed.

Dated: January 4, 2005

Respectfully submitted,

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November 23, 2004

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Re: ACLU of Kentucky, et al v.
McCreary County, Kentucky and
Pulaski County, Kentucky, et al.
Ref. No: 34-143
Case No: 99-507
Appeal: 01-5935
SC No: 03-1693

Dear Mr. Bruno:

This letter serves as consent to file an amicus brief in the case of *McCreary County, et al. v. ACLU of Kentucky, et al.*

Sincerely,

s/
Erik W. Stanley

EWS:clm

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November 22, 2004

Sent by fax (202/479-3230)

Hon. William K. Suter, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *McCreary County, Kentucky v.*
American Civil Liberties Union of Kentucky
Case No. 03-1693

Dear Gen. Suter:

I am counsel of record for the respondents, American Civil Liberties Union of Kentucky, *et al.* We hereby globally consent to the filing of all *amicus curiae* briefs in this case.

Thank you for your consideration in this matter. Please feel free to contact me if you have any questions.

Yours truly,

s/_____
David A. Friedman
General Counsel

DAF/ms

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

(10)

No. 03-1693

In the Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, ET AL.,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus, American Center for Law and Justice (ACLJ), is a nonprofit, public interest law firm and educational organization specializing in First Amendment litigation. ACLJ attorneys have argued or participated as amicus curiae in numerous cases in this Court. *See, e.g.*, *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990).

Amicus has represented nearly two dozen governmental entities in cases involving the defense of public displays of the Ten Commandments and other objects with religious significance, including the following reported cases: *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, C. J., with whom Scalia and Thomas, J. J., join, dissenting from denial of cert.) (Fraternal Order of Eagles Ten Commandments Monument in front of city hall); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F. 3d 484 (6th Cir. 2004) (Ten Commandments poster in courtroom display); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, *rehearing granted,* 2004 U.S. App. LEXIS 6636 (8th Cir. Neb., Apr. 6, 2004) (Fraternal Order of Eagles monument in city park); *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F. 3d 487 (7th Cir. 2000) (statue of Jesus Christ in city park); *ACLU v. Mercer County*, 240 F. Supp. 2d 623 (E. D. Ky. 2003) (Decalogue included in Foundations of American Law and Government courthouse display); *Schmidt v. Cline*, 127 F. Supp. 2d 1169 (D. Kan. 2000) (In God We Trust poster in county treasurer's office). The ACLJ

has developed a special expertise in this area which would be of benefit to the Court.

SUMMARY OF ARGUMENT

The decision below is premised upon the Sixth Circuit's curiously xenophobic dimissal of the Decalogue as "several thousands of years old, [and] not a product of European or American culture . . ." *ACLU of Kentucky v. McCreary County*, 354 F. 3d 438, 460 (6th Cir. 2003).[1] But, despite not having been "made in the U.S.A.," the Ten Commandments have long been acknowledged for their role in the formation of the Western legal tradition generally and Anglo-American law in particular. From the beginning of the Nation's history and, with the exception of recent decisions such as that of the court below, recognition of the Decalogue's influence on secular legal codes has been noncontroversial.

Such recognition has manifested itself historically in widespread references to the Decalogue by government officials, especially members of the judiciary, as a source and symbol of law. Depictions of Moses and the Ten Commandments in public buildings and spaces, especially those concerned with the making of laws and the administration of justice, are ubiquitous and may be considered "part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Widespread use of the Ten Commandments as a symbol of rules in purely secular contexts further demonstrates that a reasonable observer, viewing the Decalogue in the context in which it is displayed

[1] A similar observation could be made about such rather ubiquitous things as the wheel, numbers, language, fire and the human race itself.

by petitioners, would recognize and understand that petitioner's purpose is a secular one.

Given the historically undeniable secular impact of the Decalogue on the development of our legal system, as well as its culturally pervasive use as a symbol of secular law, the Sixth Circuit's virtual presumption of invalid religious purpose and implicit requirement that governments go to extraordinary lengths to "secularize" displays of the Decalogue is unwarranted by the Establishment Clause.

ARGUMENT

THE HISTORY AND UBIQUITY OF GOVERNMENTAL AND OTHER SECULAR RECOGNITION OF THE DECALOGUE SUPPORTS THE INCLUSION OF THE TEN COMMANDMENTS IN A DISPLAY OF FOUNDATIONS OF AMERICAN LAW.

The decision below completely omitted any reference to the "history and ubiquity" element of this Court's endorsement test.[2] *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) ("because of their history and ubiquity, those practices [Thanksgiving, In God We Trust] are not understood as conveying government approval of particular religious beliefs"); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged

[2] This deficiency was noted by the dissent. *McCreary County*, 354 F. 3d 438, 479-482 (6th Cir. 2003) (Ryan, J., dissenting).

governmental practice conveys a message of endorsement of religion"); *Capitol Square Review and Adv. Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring); *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (O'Connor, J., concurring) ("in examining whether a given practice constitutes an instance of ceremonial deism, its 'history and ubiquity' will be of great importance").

This case cannot be properly evaluated without an understanding of the "history and ubiquity" of the Decalogue as a secular symbol of law in American culture. In fact, a survey of the judicial, executive, legislative and other secular references to and depictions of the Ten Commandments demonstrates that such symbolic use of the Decalogue is at least as ubiquitous and as much a part of "our Nation's cultural landscape," *Newdow*, 124 S. Ct. at 2322, as other traditional practices expressly or implicitly approved by this Court. *See, e.g., Lynch*, 465 U.S. at 674-678 (listing practices which do not violate the Establishment Clause such as Thanksgiving and Christmas national holidays, paid military chaplains, legislative invocations, "In God We Trust" as national motto, "One Nation Under God" in Pledge of Allegiance, executive proclamations of days of prayer and thanksgiving, display of religious art in public museums, provision of chapels in U.S. Capitol for worship and meditation, and this Court's permanent display of Moses with the Ten Commandments).

A. *Evidence of Judicial Recognition*

1. The U.S. Supreme Court

On at least seven occasions, members of this Court have noted the foundational role of the Ten Commandments in the

development of our legal system.[3] See, *McGowan v. Maryland*, 366 U.S. 420 (1961) (Frankfurter, J.,) ("Innumerable civil regulations enforce conduct which harmonizes with religious concerns. State prohibitions of murder, theft and adultery reinforce commands of the decalogue"); *Griswold v. Connecticut*, 381 U.S. 479, 529, n.2 (1965) (Stewart, J., dissenting) (most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J. dissenting) (the Ten Commandments, undeniably, "have had a significant impact on the development of secular legal codes of the Western World"); *Lynch*, 465 U.S. at 677 (Burger, C.J.) (noting with approval the presence of depiction of Moses and Ten Commandments on Supreme Court's wall); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (Brennan, J.) (Ten Commandments have played both a secular and religious role in the history of Western Civilization); *County of Allegheny,* 492 U.S. at 652-53 (Stevens, J., with whom Brennan, J., and Marshall, J., join concurring in part, dissenting in part) (carving of Moses with Ten Commandments on wall of Supreme Court's courtroom alongside famous secular lawgivers is a fitting message for a courtroom); *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, C. J., with whom Scalia, J. and Thomas, J., join, dissenting from denial of certiorari) ("Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes").

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[3] The late Chief Justice Warren attributed such a role to the Bible in general: "I believe the entire Bill of Rights came into being because of the knowledge our forefathers had of the Bible and their belief in it . . . ," quoted in TIME, Feb. 15, 1954.

2. The State Supreme Courts

There are well over a hundred references to the Ten Commandments in the reported decisions of the state supreme courts. Appendix A lists the relevant citations. Each case contains some statement acknowledging the foundational role of the Decalogue in Anglo-American jurisprudence or a reference to the Commandments as an archetype of Law in general. The following examples are illustrative of the tenor of this recurrent theme of American jurisprudence:

- *Bertera's Hopewell Foodland, Inc. v. Masters,* 236 A.2d 197, 200-201 (Pa. 1967) ("This Act of 1794 (Pennsylvania Sunday Closing Law) itself traces an ancestry back to the Ten Commandments fulminated from the smoking top of Mt. Sinai. This divine pronouncement became part of the Common Law inherited by the Thirteen American colonies and by the sovereign States of the American union.")

- *Moore v. Strickling,* 33 S.E. 274, 277 (W.Va. 1899) ("[I]t is said that the illustrious King Alfred adopted the Ten Commandments as the foundation of the early laws of England, contained in his Doom Book. These commandments * * * appeal to us as coming from a superhuman or divine source, and no conscientious or reasonable man has yet been able to find a flaw in them. Absolutely flawless, negative in terms, but positive in meaning, they easily stand at the head of our whole moral system, and no nation or people can long continue a happy existence in open violation of them.")

- *State v. Gamble Skogmo, Inc.,* 144 N.W.2d 749, 768 (N.D. 1966) ("Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery

and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.")

- *Commissioners of Johnson County v. Lacy,* 93 S.E. 482, 487 (N.C. 1917) ("[O]ur laws are founded upon the Decalogue; not that every case can be exactly decided according to what is there enjoined, but we can never safely depart from this short but great declaration of moral principles without founding the law upon the sand, instead of upon the eternal rock of justice and equity.")

- *O'Rourk v. State,* 53 N.W. 591, 592 (Neb. 1892) ("Free discussion, however, is the outgrowth of free government. All free government is based on the divine law. God gave the ten commandments to Moses, which contain rules designed to apply to the whole race. Although given to the Israelites, they were designed for all humanity.").

- *Anderson v. Maddox,* 65 So.2d 299, 301-302 (Fla. 1953) ("'Thou shalt not steal' and 'thou shalt not bear false witness' are just as new as they were when Moses brought them down from the Mountain.")

Without listing or citing the scores of references to the Decalogue in the decisions of the lower federal and state courts, the foregoing sampling must suffice to demonstrate the point; namely, the judicial branch of our government has historically, unhesitatingly made the connection between the Ten Commandments and our legal system — the same connection made by McCreary County's inclusion of the Commandments in its display.

B. *Recognition by the Executive Branch*

Presidential recognition of the Ten Commandments' role in our legal system and culture has not been wanting. Besides frequent references to the general concept of civic order being based on divine law[4] several U.S. Presidents have made specific reference to the foundational role of the Decalogue; for example, President John Adams wrote:

> If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be

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[4] For example:

". . . the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained. . ." *Washington's First Inaugural, 1789.*

"enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence . . ." *Jefferson's First Inaugural, 1801.*

"If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove . . . shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him?" *Lincoln's Second Inaugural, 1865.*

"And yet the same revolutionary beliefs for which our forbears fought are still at issue around the globe — the belief that the rights of man come not from the generosity of the state, but from the hand of God." *Kennedy's Inaugural, 1961.*

> made inviolable precepts in every society before it can be civilized or made free.

John Adams, *4 The Works of John Adams, Second President of the United States 9*, (Francis Adams, ed. 1851);

The Nation's Sixth President wrote:

> The law given from Sinai was a civil and municipal as well as a moral and religious code; it contained . . . laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws .

John Quincy Adams, *Letters of John Quincy Adams to His Son* (Auburn: James M. Alden, 1850) pp. 61, 70-71.

Theodore Roosevelt, recounting his crusade against government corruption wrought by public officials operating without moral compasses, wrote:

> Some years ago another public man enunciated much the same doctrine in the phrase, "The Decalogue and the Golden Rule have no part in political life." Such statements, openly made, imply a belief that the public conscience is dull; and where the men who make them continue to be political leaders, the public has itself to thank for all shortcomings in public life.

Theodore Roosevelt, *The Strenuous Life*, 1900.

To Woodrow Wilson is attributed the following:

> If we had the eyes to see the subtle elements of thought which constitute the gross substance of our present habit, both as regards the sphere of private life and as regards the action of the State, we would easily discover how very much we owe to the Jews for the Ten Commandments and other contributions to Western Law.

Quoted in *Equity Inv. v. Paris*, 437 N.Y.S. 2d 1000, 1001 (N. Y. Civ. Ct. 1981).

And, in his characteristically terse fashion, Harry S. Truman said:

> The fundamental basis of this nation's laws was given to Moses on the Mount.

Harry S. Truman, *Public Messages, Speeches and Statements by the President, Jan. 1 to Dec. 31, 1950* (Washington, D.C., U.S. Government Printing Office, 1965) Item 37, p. 157.[5]

C. *Legislative Recognition*

Because, as Justice Frankfurter observed, "innumerable civil regulations . . . reinforce commands of the decalogue," *McGowan v. Maryland*, 366 U.S. 420 (1961), it should come as no surprise to find that, historically, the foundational role of the Commandments has found expression in legislation. It

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[5] For Truman, the law given on Sinai was *the* basis of American law. McCreary County, by contrast, is content to include the Decalogue as merely one among many sources of the law.

is no exaggeration to say that the Ten Commandments, *literally*, have been part of our legal system for over a millennium.

Sir William Blackstone identified King Alfred as the founder of the English common law. *Blackstone's Commentaries*, Book I, Sec. 2.[6] The Laws of King Alfred — the very first written compilation of our laws — start with the Ten Commandments.[7]

The ubiquity of the Ten Commandments in our history also manifests itself in the legal codes of the thirteen original colonies. It may fairly be said that all of the colonies incorporated the Decalogue — in whole or in part — in their legal codes. *See,* examples reprinted in Donald S. Lutz, ed., *Colonial Origins of the American Constitution: A Documentary History*, Liberty Fund, Indianapolis 1998. After independence, the Commandments continued to exert an obvious and strong influence on legislation, even legislation drafted by ardently anti-Establishment lawmakers such as Jefferson and Madison. It was Jefferson, after all, who (along with Madison,) when revising Virginia's code in 1785, included "Bill Number 84: Bill for Punishing Disturbers of

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[6] The founding generation learned its law from Blackstone's *Commentaries on the Laws of England*. Albert Altschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1 (1996). As historian Daniel Boorstin puts it, "In the history of American institutions, no other book — except the Bible — has played so great a role . . ." Daniel J. Boorstin, *The Mysterious Science of the Law* (1958).

[7] Harold J. Berman, *Individualistic And Communitarian Theories of Justice: An Historical Approach* 21 U. Cal. Davis L. Rev. 549-575 (1988).

Religious Worship and Sabbath Breakers," *see* Daniel L. Dreisbach, "Religion and Legal Reforms in Revolutionary Virginia," in *Religion and Political Culture in Jefferson's Virginia*, Sheldon, G. W., and Dreisbach, D. L., eds., Rowman and Littlefield Publishers, Inc., Lanham, Md., 2000.[8]

Aside from the broad and undeniable influence of the Mosaic law on our legal system in general,[9] it is clear that specific provisions of the Ten Commandments continue to directly influence and, indeed, be incorporated into our legal codes as even a cursory look at our criminal codes will attest.

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[8] For Jefferson, recourse on important official occasions to the imagery of Moses and the Israelites was apparently second nature. His original design for the Great Seal of the United States was of Moses leading the people of Israel through the Red Sea while Pharaoh and his army drowned, with the following motto: "Rebellion to Tyrants is Obedience to God." Hutson, James H., *Religion and the Founding of the American Republic*, 1998, Library of Congress, Washington, D.C., pp. 50-51. His Second Inaugural also evokes Exodus:

> I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land and planted them in a country flowing with all the necessities of life . . .

A Compilation of the Messages and Papers of the Presidents, 1789-1897, 10 vols. (Washington, D.C., U.S. Government Printing Office).

[9] *See, e.g.*, Russell Kirk, *The Roots of American Order*, Regnery Gateway, 1991, 11-49; *and* Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding*, Encounter Books, 2001.

Even the oft-repeated truism that the first three or four of the Commandments are "exclusively religious" turns out not to be true. *See Stone v. Graham*, 449 U.S. at 41-2 (1980). The *Stone* Court majority's characterization of the "first part of the Commandments" as "exclusively religious" cannot withstand examination.[10] The Sabbath observance Commandment was deemed to have broad secular application by the Court itself in *McGowan v. Maryland*, 366 U.S. 420 (1961). The Commandment against "using the Lord's name in vain" is applied in daily secular life, especially in law and politics, where witnesses and government officials still swear to tell the truth or uphold the law "so help me God." *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d at 507 (6th Cir. 2004) (Batchelder, J., dissenting).

The Commandment against worshipping idols, paradoxically, has had arguably the broadest secular application of all: it was referred to by the pamphleteers of the Revolutionary era as one of the reasons for overturning monarchy with its pretensions of "divine right." *Id.* Thomas Paine, free-thinking Deist though he may have been, made the

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[10] While the routine application of *Stone* by lower courts in Ten Commandments cases is understandable at first glance, it is clear that the lower courts have placed far too much weight on what is, by this Court's definition, a weak precedent. *Stone* was a 5-4 *per curiam* decision rendered without briefing or oral argument. This Court has said that it is "less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument." *Hahn v. United States*, 524 U.S. 236, 257 (1998); *also, Gray v. Mississippi*, 481 U.S. 648, 651, n.1 (1987) (citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)) ("The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument").

connection which he knew would resonate with the readers of his best-selling *Common Sense*:

> And when a man seriously reflects on the idolatrous homage which is paid to the persons of kings, he need not wonder that the Almighty, ever jealous of his honor, should disapprove a form of government which so impiously invades the prerogative of heaven.

Thomas Paine, *Common Sense*, quoted in *The Founders' Constitution*, Vol. I, ch. 4, p. 106.

This equating of the British regime with idolatry was a common rhetorical tool used by advocates of American independence in colonial times. Paine was, in fact, merely echoing sentiments widely voiced among his countrymen:

> Not only did Parliament's claims represent tyranny, they also represented idolatry. For colonists to honor these claims would be tantamount to forsaking God and abdicating their national covenant pledge to "have no other gods" before them.

Harry A. Stout, *How Preachers Incited Revolution*, Christianity Today, Spring 1996.

James Otis, in his 1764 work, *The Rights of the British Colonies Asserted and Proved*, thundered:

> It is the greatest idolatry, begotten by flattery, on the body of pride, that could induce one to think that a single mortal should be able to hold so great a power . . . The power of GOD almighty is the only power

> that can properly and strictly be called supreme and absolute.

The Founders' Constitution, Kurland and Lerner, eds. Vol. One, p. 52 (all caps in original.)

Thus, even the First Commandment, the one most readily dismissed in this context as having no discernible secular application, is shown to have had direct secular, political application in the creation of the American polity itself. It is beyond serious question, therefore, that the Ten Commandments — all ten of them — have exerted an enormous influence both on the general framework of our legal system as well as the specifics of our legal codes.

D. *Recognition by Depiction on Public Property*

More than once, members of this Court have pointed to the depiction of Moses and the Ten Commandments in the Court's own courtroom to illustrate acceptable accommodation by government of a religious practice or display. *Lynch,* 465 U.S. at 677; *County of Allegheny*\, 492 U.S. at 652-53. In fact, the U.S. Supreme Court building has no fewer than three depictions of Moses and/or the Ten Commandments: 1) as part of the courtroom frieze, 2) dominating the East Pediment, and, 3) as part of a depiction of John Marshall on the West Pediment.[11] The East Pediment shows Moses holding the tables of the law flanked by Solon of Athens and Confucius.[12] App. B 11a-1.

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[11] Office of the Curator, United States Supreme Court.

[12] *Id.*

The U.S. House chamber features 23 marble relief portraits of "historical figures noted for their work in establishing the principles that underlie American law."[13] According to the House Curator, the "eleven profiles in the eastern half of the chamber face left and the eleven in the western half face right, so that all look towards the full-face relief of Moses in the center of the north wall."[14] App. B 11a-2.

Courthouses and other public buildings across the nation abound with depictions of Moses and the Ten Commandments. The following is a nonexhaustive list of examples (where available, photographs of the depictions are contained in App. B):

- *U.S. Courthouse/Federal Building in Cleveland, Ohio*
  Main courtroom dominated by Edwin Blashfield's "The Law," the center of which depicts two angels pointing at a stone on which are inscribed the Ten Commandments. See "Brief Description of Mural Paintings and Statuary, Federal Building, Cleveland, Ohio." U.S. Dist. Ct. N.D. Ohio, Clerk's Office. See App. B 11a-3.

- *U.S. Courthouse in Indianapolis, IN*
  Ceremonial courtroom features W. B. Van Ingen's "Appeal to Justice" surmounted by two winged figures, one of whom holds the tablets of the

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[13] Office of the Curator, U.S. House of Representatives.

[14] *Id.*

Decalogue. Painting is located above the bench. *Traces*, Vol. 15, No. 3, Summer 2003. App. B 11a-4.

- *Pennsylvania Supreme Court in Harrisburg, PA*
  Supreme Court courtroom contains painting of "The Decalogue — Hebrew Idea of Revealed Law." App. B 11a-5.

- *Cuyahoga County Courthouse in Cleveland, OH*
  County Courthouse has eleven foot high marble statue of Moses holding the Commandments. Statue is above the courthouse's main entrance. App. B 11a-6.

- *Minnesota Supreme Court in St. Paul, MN*
  Features painting of Moses receiving the Ten Commandments on Mt. Sinai. App. B 11a-7.

- *U.S. District Courthouse in Washington, D.C.*
  Ceremonial courtroom displays statues of Moses, Hammurabi, Solon and Justinian. App. B 11a-8.

- *Chester County Courthouse, West Chester, PA*
  Plaque containing text of Ten Commandments affixed to outside wall of courthouse. Constitutional challenge rejected by Third Circuit in *Freethought Society v. Chester County*, 334 F. 3d 247 (3d Cir. 2003) App B 11a-9.

- *Michigan Supreme Court, Lansing, MI*
  Decalogue included in a display of Cornerstones of Law.

- *Allegheny County Courthouse, Pittsburgh, PA*
  Plaque containing text of Decalogue on outside of courthouse. Constitutional challenge rejected by Third Circuit in *Modrovich v. Allegheny County*, 385 F. 3d 397 (3d Cir. 2004).

- *Tennessee Supreme Court, Knoxville, TN*
  Courtroom frieze contains depiction of tablets of the Ten Commandments.

- *New York State Appellate Court, Brooklyn, NY*
  Bas-relief of Moses with Decalogue on the façade of the courthouse. App. B 11a-10.

- *Boston Public Library, Boston, MA*
  John S. Sargent mural of Moses with Commandments in Hebrew script as central panel of north wall. App. B 11a-11.

- *Ronald Reagan Building, Washington, DC*
  "Liberty of Worship" statue resting on the Ten Commandments outside Ronald Reagan Building in Washington, D.C. App. B 11a-12.

- *National Archives, Washington, D.C.*
  Ten Commandments depiction embedded in floor of National Archives Building. App. B 11a-13.

- *Library of Congress, Washington, D.C.*
  Statue of Moses holding Decalogue overlooks main reading room. App. B 11a-14.

- *Nebraska State Capitol, Lincoln, NE*
  Statue of Moses the Lawgiver on outside of state capitol building.

- *Allen County Courthouse, Fort Wayne, IN*
  Circuit Courtroom in Allen County has a mural of Moses and Justinian presenting their laws to their people.

In addition, we know from the case law that the Decalogue has been displayed for decades in courthouses and other public buildings and spaces in Elkhart, Indiana[15]; Cobb County, Georgia[16]; Haywood County, North Carolina[17]; La Crosse, Wisconsin[18]; Salt Lake City, Utah[19]; Denver, Colorado[20]; and dozens of other places across the nation.[21]

The ubiquity of the Ten Commandments as a universally recognizable symbol of Law is thus seen in the incorporation of the Decalogue into the artwork and architecture of our public buildings where our laws are made, interpreted, and

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[15] *Books v. City of Elkhart*, 235 F. 3d 292 (2000) *cert. denied*, 532 U.S. 1058 (2001).

[16] *See Harvey v. Cobb*, 811 F. Supp. 669 (N. D. Ga. 1993), *aff'd* 15 F.3d 1097 (11th Cir. 1994).

[17] *See Suhre v. Haywood Cty.*, 55 F. Supp. 2d 384 (W. D. N. C. 1999).

[18] *Freedom From Religious Foundation, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1987).

[19] *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir.) *cert. denied*, 414 U.S. 879 (1973).

[20] *Freedom From Religion Foundation, Inc. v. State of Colorado*, 898 P.2d 1013 (Colo. 1995) *cert. denied*, 516 U.S. 1111 (1996).

[21] *See Anderson, supra.*

executed. In a far more literal sense than the legislative prayer at issue in *Marsh*, the Ten Commandments have become "part of the fabric of our society." 463 U.S. at 792.

E. *Recognition in Secular and Popular Culture*

It is also significant to note the way in which the Ten Commandments have become part of secular and popular culture and discourse. This not only distinguishes their use as a symbol from more quintessentially religious symbols such as crucifixes and crèches, but also underscores the fact that, for a reasonable observer, no message of religious disapproval or disenfranchisement automatically follows from a governmental display of the Decalogue.

The cultural ubiquity of the Decalogue is perhaps best illustrated by the frequency with which the phrase "Ten Commandments of . . ." is used in our culture — not connected with religion at all — to convey a set of important, authoritative rules or guidelines for a variety of activities. A survey of periodicals, articles and books from such diverse, secular disciplines as medicine, sociology, business and agriculture shows literally hundreds of titles using the phrase "Ten Commandments of . . ." in purely secular settings. (Appendix C sets forth nearly 200 such titles found in an internet search of databases in "Kentucky Virtual Public Library" on November 27, 2004).

It seems unlikely that a "reasonable observer," who embodies "a community ideal of social judgment, as well as rational judgment," *Pinette*, 515 U.S. at 781, would perceive a message of approval or disapproval of his or her religious choices when, after overindulging on Thanksgiving, he or she picks up a copy of "The Ten Commandments of buying TV fitness gadgets." App. C. The reasonable Zoroastrian

otologist would probably not turn in his medical license in disgust after perusing "Ten Commandments for writing a marvelous medical paper" in his office copy of "ENT: Ear, Nose and Throat Journal." App. C. Few, if any, atheist attorneys would withdraw their appearances in cases in the Eighth Circuit Court of Appeals even after stumbling upon the reference to Judge Myron Bright's "The Ten Commandments of Oral Argument" on the Eighth Circuit's website. App. C; also at, *Practitioner's Handbook for Appeals to the Eighth Circuit*, Third Edition (2000) at 105.

The point, of course, is that references to the Decalogue in completely secular contexts are so ubiquitous in American society that the reasonable observer does not automatically think "religion" every time he or she sees a depiction of or comes across the words "The Ten Commandments;" nor does the reasonable observer require a learned treatise setting forth the evidence connecting the Decalogue with the development of Anglo-American law and culture, *McCreary County*, 354 F. 3d at 476 (Ryan, J., dissenting) in order to dispel any suspicion that "The Ten Commandments of Furniture Repair" might be a sly attempt at religious proselytization. App. C.

* * *

The Sixth Circuit's failure to appreciate the place in the Nation's cultural landscape of the Ten Commandments as a universally recognized symbol of Law led to the erroneous result in this case. The nation's courthouses and court decisions, its legislation and legislators, its political and popular culture, all combine to repudiate the Sixth Circuit's absurdly jingoistic and narrow-minded dismissal of the Decalogue as something "several thousands of years old, [and] not a product of European or American culture . . ."

McCreary County, 354 F. 3d at 460. On the contrary, the widespread and longstanding recognition by government and secular society of the Decalogue's foundational role is firmly embedded in American culture and, like the traditions and practices catalogued by this Court in *Marsh* and *Lynch*, is "part of the fabric of our society." *Marsh*, 463 U.S. at 1792.

CONCLUSION

Justice Goldberg once wrote that:

> [n]either government nor this Court can or should ignore the significance of the fact that many of our legal, political and personal values derive historically from religious teachings.

Abington School Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)

The Sixth Circuit's decision in this case ignores the significance of the Decalogue's role in and impact on American culture. The court's erroneous reasoning is constitutionally unwarranted and historically myopic and would lead to the bulldozing of the Nation's cultural landscape.

This Court should reverse the decision of the court below.

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APPENDIX A

STATE SUPREME COURT DECISIONS WHICH REFER TO THE TEN COMMANDMENTS

Addison v. State, 116 So. 629 (Fla. 1928)

Albany Theatre, Inc. v. Short, 154 S.E. 895, 898 (Ga. 1930)

Ames, City of, v. Gerbracht, 189 N.W. 729, 733-734 (Iowa 1922)

Amick v. Montross, 220 N.W. 51, 56 (Iowa 1928)

Anderson v. Maddox, 65 So.2d 299, 301-302 (Fla. 1953)

Atlanta & C. A. L. R. Co. v. Gravitt, 20 S.E. 550, 552 (Ga. 1893)

Barbour v. Barbour, 330 P.2d 1093, 1098 (Mont. 1958)

Baumhoff v. St. Louis & K. R. Co., 104 S.W. 5, 12 (Mo. 1907)

Bertera's Hopewell Foodland, Inc. v. Masters, 236 A.2d 197, 200-201 (Pa. 1967).

Brimhall v. Van Campen, 8 Minn. 13, 22 (1863)

Broadwater v. Otto, 88 A.2d 878, 882 (Pa. 1952)

Bunch v. Shaw, 355 So. 2d 1383, 1384 (Miss. 1978)

Byrn v. New York City Health & Hospitals Corp., 286 N.E.2d 887, 894 (N.Y. 1972)

Caldor, Inc. v. Thornton, 464 A.2d 785 (Conn. 1983)

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Campbell v. State, 11 Ga. 353, 373 (1852)

Carolina Amusement Co. v. Martin, 115 S.E.2d 273, 277 (S.C. 1960)

Cason v. Baskin, 20 So.2d 243, 247 (Fla. 1944) (en banc)

Chance, State v., 221 P. 183, 188 (N.M. 1923)

Chapman Dodge Center, Inc., State v., 428 So. 2d 413 (La. 1983)

Chicago, B. & Q. R. Co., State v., 143 S.W. 785, 804 (Mo. 1912)

Commissioners of Johnston Co. v. Lacy, 93 S.E. 482, 487 (N.C. 1917)

Costello v. State, 260 So. 2d 198, 205 (Fla. 1972)

Crow, State ex rel., v. Shepherd, 76 S.W. 79, 93 (Mo. 1903)

Crowder v. Philips, 146 Fla. 428, 435 (Fla. 1941)

David H., In re Application of, 451 A.2d 657 (Md. 1982)

Davis, State v., 120 P.2d 808, 810 (Ariz. 1942)

Dell Publications, Inc., Commonwealth v., 233 A.2d 840, 862 (Pa. 1967)

DeRinzie v. People, 138 P. 1009, 1010 (Colo. 1913)

Discargar v. Seattle, 171 P.2d 205, 209 (Wash. 1946)

Doll v. Bender, 47 S.E. 293, 300-301 (W.Va. 1904)

Domestic Block Coal Co. v. De Armey, 102 N.E. 99, 102 (Ind. 1913)

In re Dominy, 779 P.2d 402, 405 (Idaho 1989)

Donahey, State ex rel., v. Edmondson, 105 N.E. 269, 275 (Ohio 1913)

Donaldson, State v., 99 P. 447, 449 (Utah, 1909)

Dunbar, People ex rel., v. Weinstein, 312 P.2d 1018, 1021 (Colo. 1957)

Earley v. Winn, 109 N.W. 633, 640 (Wisc. 1906)

In re Elliott, 446 P.2d 347, 364 (Wash. 1968)

Farr v. Nordman, 78 N.W.2d 186, 195 (Mich. 1956)

Feldman, State ex rel. v. Kelly, 76 So. 2d 798, 802 (Fla. 1954)

Finger, State ex rel., v. Weedman, 226 N.W. 348, 380 (S.D. 1929)

Foreman, State v., 16 Tenn. 256, 284 (1835).

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Gibbs, State ex rel. v. Couch, 139 Fla. 353, 381-382 (Fla. 1939)

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Hambrick, State v., 196 P.2d 661, 665 (Wyo. 1948)

Harris v. Security Life Ins. Co., 154 S.W. 68, 70 (Mo. 1913)

Haskins v. Royster, 70 N.C. 601, 613 (1874)

Hattiesburg v. Beverly, 86 So. 590, 592 (Miss.1920)

Haynes v. Presbyterian Hospital Ass'n , 45 N.W.2d 151, 153 (Iowa 1950)

Hennington v. the State, 17 S.E. 1009, 1010 (Ga. 1892)

Hild v. Hild, 157 A.2d 442, 448, n.5 (Md. 1960)

Hill v. Wilker, 41 Ga. 449, 453 (1871)

Hills v. State, 85 N.W. 836, 839 (Neb. 1901)

Hollywood Motion Picture Equipment Co. v. Furer, 105 P.2d 299, 301 (Cal. 1940)

Holt v. Holt, S.E.2d 504, 508 (Va. 1939)

In re Hopkins, 103 P. 805, 806 (Wash. 1909)

Hosford v. State, 525 So.2d 789, 799 (Miss. 1988)

Ex parte James, 713 So. 2d 869, 899 (Ala. 1997)

Johnson v. State, 163 S.W.2d 153, 156 (Ark. 1942)

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Kaplan v. Independent School Dist., 214 N.W. 18, 21 (Minn. 1927)

Kennade, State v., 26 S.W. 347, 350 (Mo. 1894)

In re Kien, 372 N.E.2d 376 (Ill. 1977)

Lambert v. People, 9 Cow. 578, 592 (N.Y. 1827)

Landgraver v. Emanuel Lutheran Charity Board, 280 P.2d 301, 313 (Ore. 1955)

Lane v. Department of Labor & Industries, 151 P.2d 440, 448 (Wash. 1944)

Lashley, State ex rel., v. Becker, 235 S.W. 1017 (Mo. 1921)

Lenston v. Commonwealth, 497 S.W.2d 561, 563 (Ky. 1973)

Malumphy, State v., 461 P.2d 677, 686 (Ariz. 1969)

Markham v. Markham, 272 So. 2d 813, 815 (Fla. 1973)

Marshall v. Salt Lake City, 141 P.2d 704, 711 (Utah 1943)

Mayer v. Frobe, 22 S.E. 58, 61 (W.Va. 1895)

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McCurdy, State ex rel., v. Bennett, 163 N.W. 1063, 1066 (N.D. 1917)

Mei, Ex parte, 192 A. 80, 82 (N.J. 1937)

Missouri P. R. Co., State v., 147 S.W. 118, 123 (Mo. 1912)

Moore v. Strickling, 33 S.E. 274, 277 (W.Va. 1899)

Mosko v. Dunbar, 309 P.2d 581, 590 (Colo. 1957)

Murphy v. Campbell Inv. Co., 486 P.2d 1080, 1083 (Wash. 1971)

Murrow Indian Orphans Home v. Childers, 171 P.2d 600, 609 (Okla. 1946)

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Ogden, State ex rel., v. Hunt, 286 P.2d 1088, 1092 (Okla. 1955)

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Palmetto Golf Club v. Robinson, 141 S.E. 610, 619 (S.C. 1928)

Paramount-Richards Theatres v. City of Hattiesburg, 49 So.2d 574, 577 (Miss. 1950)

Pearce v. Atwood, 13 Mass. 324, 345-346 (1816)

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Silliman v. People, 162 P.2d 793, 800 (Colo. 1945)

South C. & C. S. R. Co. v. Herrklotz, 47 S.W. 265, 269 (Ky. 1898)

Sparhawk v. Union P. R. Co., 54 Pa. 401, 433 (1867)

Spoon-Shacket Co. v. Oakland County, 97 N.W.2d 25, 32 (Mich. 1959)

Starobin v. Northridge Lakes Development Co., 287 N.W.2d 747, 753 (Wisc. 1980)

Steinman v. McWilliams, 6 Pa. 170, 173 (1847

Stephens v. Commonwealth, 522 S.W.2d 181, 183 (Ky. 1975)

Stevens v. Woodmen of World, 71 P.2d 898, 902 (Mont. 1937)

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Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95, 101 (Ind. 1974)

Swift & Co. v. Peterson, 233 P.2d 216, 231 (Or. 1951)

Tampa, City of v. State, 48 So.2d 78, 79 (Fla. 1950)

Territory v. Fasi, 40 Haw. 478, 484 (Haw. 1954)

Thayer v. Littlejohn, 1841 La. LEXIS 69, 2; 1 Rob. 140 (1841)

Theisen v. McDavid, 16 So. 321, 323 (Fla. 1894)

Thomas, People v., 2 Cal. 4th 489, 537 n16 (1992)

Thronson v. Blough, 166 N.W. 132, 134 (N.D. 1917)

Tinder v. Clarke Auto Co., 149 N.E.2d 808, 813 (Ind. 1958)

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Watts v. Gerking, 228 P. 135, 141 (Ore. 1924)

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West v. State, 67 So. 2d 366, 369 (Miss. 1953)

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White v. East Side Mill & Lumber Co., 158 P. 527, 528 (Ore. 1916)

Wright v. Daniels, 164 N.W.2d 180, 185 (Iowa 1969)

Yarnall v. Yarnall, 460 N.W.2d 161, 165 (S.D. 1990)

Yunker v. Nichols, 1 Colo. 551, 553 (1872)

APPENDIX B

COLOR PHOTOS

DEPICTIONS OF MOSES AND THE TEN COMMANDMENTS ON PUBLIC PROPERTY

East Pediment of U.S. Supreme Court Building

Detail

11a-2

Chamber of U.S. House of Representatives
Relief of Moses

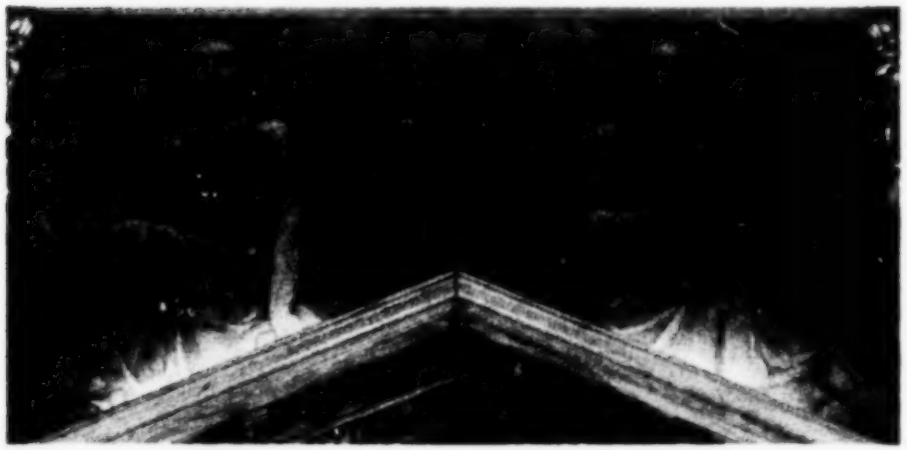
11a-3

U.S. Courthouse / Federal Building in Cleveland, Ohio
Blashfield's mural "The Law"

Detail

11a-4

U.S. Courthouse in Indianapolis, Indiana
Van Ingen's "Appeal to Justice"



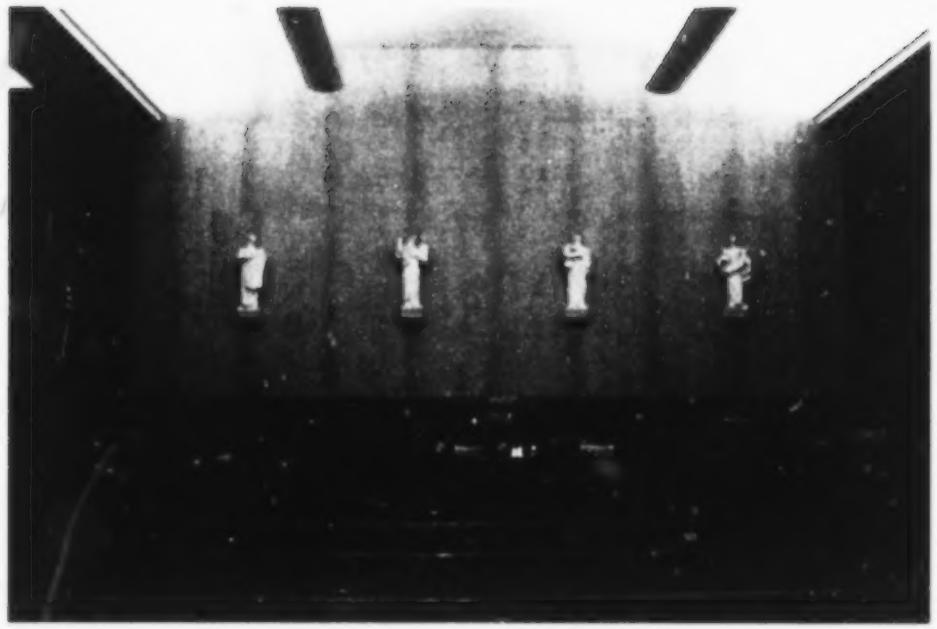
Detail

11a-5

Pennsylvania Supreme Court
"The Decalogue — Hebrew Idea of Revealed Law"

Cuyahoga County Courthouse in Cleveland, Ohio
Statue of Moses Overlooking Main Entrance

.Minnesota Supreme Court
Moses Receiving the Ten Commandments



U.S. District Courthouse, Washington, D.C.
Statutes of Hammurabi, Moses, Solon, Justinian

Chester County Courthouse
Chester County, Pennsylvania

Monroe Place Courthouse
New York Appellate Division, Second Judicial Department
Brooklyn, New York
Bas-Relief of Moses

Boston Public Library,
Central Panel of North Wall
Mural of Moses by J.S. Sargent

Ronald Reagan Building and International Trade Center
Washington, D.C.

National Archives Building
Washington, D.C.

Library of Congress, Washington, D.C.
Statue of Moses Overlooking Main Reading Room

APPENDIX C

Results of internet search November 27, 2004, of periodicals, articles and books containing title "Ten Commandments of . . ." in "Kentucky Virtual Public Library"

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2. *The Ten Commandments of Consultation-Liaison*, Hall, Howard R., Contemporary Psychology: APA Review of Books, 1995, Vol 40(1), p. 36.

3. *Ten commandments for avoiding clergy malpractice in pastoral counseling*, Berman, William B, Christian Family Inst, Tulsa, OK, US, Journal of Psychology & Christianity

4. *Treatment outcome research in child psychology: Realistic coping with the "Ten Commandments of Methodology,"* Peterson, Lizette, Bell-Dolan, Debora, U Missouri, Dept of Psychology, Columbia, US, Journal of Clinical Child Psychology

5. *Teaching questionnaire construction effectively: The Ten Commandments of question writing*, Ellard, John H., Contemporary Social Psychology

6. *The ten commandments of pediatric Emergency Medicine*, Givens T., Journal of emergency medicine 27 (2), 193-4

7. *The Ten Commandments*, Gould, J.S., American journal of orthopedics 32 (12), 578

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9. *Ten commandments of enzymology*, Kornberg, A., Trends in biochemical sciences 28 (10), 515-7

10. *The ten commandments of caring for patients after open heart surgery*, Simani-Oren L, Home healthcare nurse 21 (8), 551-6; quiz 557-8

11. *The ten commandments: what every surgeon should know about performing dermatologic surgery*, Robins, P., Journal of drugs in dermatology : JDD 1 (2), 140-4

12. *The Ten Commandments of effective budgeting*, Levin, RP, Compendium of continuing education in dentistry 23 (5), 396-8, 400

13. *Medical consequences of biological warfare: the Ten Commandments of management*, Cieslak, TJ, Military medicine 166 (12 Suppl), 11-2

14. *The ten commandments in multiple pregnancies*, Di Renzo, GC, et al., Twin research : the official journal of the International Society for Twin Studies 4 (3), 159-64

15. *Ten commandments of risk management*, Johnson, WB, Journal of the Mississippi State Medical Association 41 (9), 732-4

16. *Environmental angels. Catholic health care system abides by environmental Ten Commandments*, Nordhaus-Bike AM, Materials management in health care 9 (6), 20, 22

17. *Ten commandments for preventing contamination of primary cell cultures*. Vierck JL, Methods in cell science : an official journal of the Society for In Vitro Biology 22 (1), 33-41

18. *Ten commandments of headache medicine*, Singer RS, Headache 39 (8), 589-90

19. *The ten commandments of office-based surgery with anesthesia*, Harouche EF, Plastic and reconstructive surgery 102 (3), 927

20. *Ten commandments for writing family medicine grants*. , Beasley JW, Family medicine 30 (7), 515-6

21. *Ten commandments of peer review*, Maguire D, Neonatal network : NN 17 (1), 63-7

22. *The ten commandments of behavioral genetic data and criminology*, Nygaard RL, Judges' journal 36 (3), 59-64, 94-96

23. *Ten commandments for the care of terminally ill patients*, Whitten JR, American family physician 57 (5), 935, 939-40

24. *Four indefensible phlebotomy errors and how to prevent them*, Ernst DJ, Journal of healthcare risk management : the journal of the American Society for Healthcare Risk Management 18 (2), 41-6

25. *Getting your message out with social marketing*, Manoff RK, American journal of tropical medicine and hygiene 57 (3), 260-5

26. *The ten commandments of psychiatric research*. Detre T, Biological psychiatry 40 (7), 675-81

27. *Ten principles and ten commandments of radiation protection*, Strom DJ, Health physics 70 (3), 388-93

28. *Guidelines for treating low back pain in primary care*. The Israeli Low Back Pain Guideline Group, Borkan J, Harefuah 130 (3), 145-51; 224

29. *Ten measurement commandments that often should be broken*, Knapp TR, Research in nursing & health 18 (5), 465-9

30. *Ten commandments of TQM*, Sahney VK, Healthcare information management : journal of the Healthcare Information and Management Systems Society of the American Hospital Association 8 (4), 3-4

31. *Ten commandments without Mr. DeMille.*, Friedenreich K, Administrative radiology : AR 13 (6), 42-5

32. *The ten commandments of caring for HIV-infected patients*, Glatt AE, Infectious disease clinics of North America 8 (2), 275-8

33. *Back then--plus ten commandments for graduates with illustrative cases*, Hardy JD Journal of the Mississippi State Medical Association 34 (3), 83-5

34. *The ten commandments of emergency medicine*, Wrenn K, Annals of emergency medicine 20 (10), 1146-7

35. *Ten commandments for safe lipoplasty*, Mladick RA, Plastic and reconstructive surgery 87 (2), 382

36. *Heart valves: ten commandments and still counting*, Harken DE, Annals of thoracic surgery 48 (3 Suppl), S18-9

37. *Adhesion and its ten commandments*, Matasa CG, American journal of orthodontics and dentofacial orthopedics : official publication of the American Association of orthodontists, its constituent societies, and the American Board of Orthodontics 95 (4), 355-6

38. *Ten commandments for clinical training*. Hornblow AR, New Zealand medical journal 101 (854), 604-6

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40. *The Ten Commandments of Medical Ethics*, Bonsett CA, Indiana medicine : the journal of the Indiana State Medical Association 80 (11), 1034, 1065

41. *The ten commandments of buying a computer system*, Costa NG, Journal 49-50

42. Ten 'A' commandments from the Good Health Symposium. Dawson D, Practitioner 230 (1416), 516-8

43. *Ten legal commandments for nurses who get sued*, Mandell M, NursingLife 6 (3), 18-21

44. *The ten commandments for immunotherapeutic drugs at the example of sulfur-containing agents*. Renoux G, Comparative immunology, microbiology and infectious diseases 9 (2-3), 121-9

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46. *Two sets of ten commandments for obstetricians*, Odent M, Journal of medical ethics 11 (1), 53

47. *Ten commandments of medical etiquette for psychiatrists*. Pasnau RO, Psychosomatics 26 (2), 128-32

48. *The ten commandments of arbitration*, McDonald PA, Michigan nurse 57 (2), 8

49. *Ten commandments of management for supervisors to follow.*, Health care newsletter 1

50. *Ten commandments for effective consultations*, Goldman L, Archives of internal medicine 143 (9), 1753-5

51. *Ten commandments for effective community relations*, Poole MD, Journal 32-4

52. *Ten commandments for defendant-doctors: a lawyer's advice to furious, injured physicians accused of malpractice*, Mandell MS, Postgraduate medicine 70 (6), 202-3

53. *Ten commandments of infection control*, Lee M, Health care (Don Mills) 23 (11), 21

54. *Ten commandments for parents*, Newsletter - Department of Health National League of Nurses, Manila, Philippines 21 (4), 21-2

55. *Ten commandments of good urologic practice*. Bensimon H, Postgraduate medicine 68 (6), 81-2

56. *The ten commandments--or how the therapist can avoid delinquency*, Berry R Journal of adolescence 2 (4), 297-306

57. *Deinstitutionalization: avoiding the disasters of the past.*, Talbott JA, Hospital & community psychiatry 30 (9), 621-4

58. *Ten commandments for the writing of good standard*, Schmidt, OH Clinical engineering news 5 (1), 5

59. *The teaspoon dose*, Catzel P, South African medical journal 51 (17), 592-4

60. *Posterior arch stapedioplasty. Ten commandments for stapedectomy*, Goodhill V, Archives of otolaryngology 100 (6), 460-4

61. *Ten commandments for a training supervisor (who wants to alienate his disciples)*, Parrish MJ, Hospital #38; community psychiatry 24 (9), 633

62. *Ten commandments for improving survival*. Bacon HE, Pennsylvania medicine 74 (2), 59-62

63. *Ten commandments of good communication*. Canadian journal of psychiatric nursing 10 (6), 14-5

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72. *The ten commandments of sports nutrition*, Nieman, D.C., Women's Sports & Fitness Mar89, Vol. 11 Issue 2, p58 4p; 1 illustration

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81. *Ten commandments for permissions*, Anonymous, Searcher; Apr 1999

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83. *Ten Commandments of confrontation (or clarification)*, Anonymous, Association Management; Nov 1998

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85. *Setting in stone the Ten Commandments of I-commerce*, Dylan Tweney, InfoWorld; Feb 2, 1998

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87. *Currid's Ten Commandments Puts Electronic Mail Use on Top*, Currid, Cheryl, InfoWorld; Sep 28, 1992

88. *The Ten Commandments: 25 Years of Managing Projects Has Taught This Author Many Lessons* Hall, Ted, Computing Canada; Jan 19, 1989

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92. *The ten commandments of communicating with people with disabilities*, Irene M. Ward & Associates. 1 videocassette (52 min.) : sd., col. ; 1/2 in. + 16 p. accompanying materials

93. *Ten commandments for group*, Williams, B., Sept 1992. v. 37 (9) ; 37, 9, p. 1-2.

94. *Harold F. Breimyer's ten commandments for farm policy--and an eleventh*, Breimyer, H., Second Quarter 1990. v. 5 (2) ; 5, 2, p. 3.

95. *The ten commandments of firing*, Recker, W.A., May 1987. v. 32 (5) ; 32, 5, p. 42-43

96. *Ten commandments for agricultural economics (and perhaps other) administrators*, Beattie, B.R., Dec 1983. v. 8 (2) ; 8, 2, p. 209-214.

97. *Ten commandments for trainees*, Marsh, Gerald, Dec 1978. v. 15 (12) ; 15, 12, p. 78-79.

98. *The Ten Commandments of apple marketing*, Miller, C.R., Sept 1975, 353 ; p. 6.

99. *Starting chicks right : with the ten commandments of chick raising*, Hanke, Oscar, August 31 p. : ill. 21 cm.

100. *Ten commandments for aviators*, Air Safety Week; Sep 20, 2004

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103. *The Ten Commandments of Yellow Pages advertising*, Barry Maher, Air Conditioning, Heating & Refrigeration News; Jan 29, 2001

104. *Ten commandments of security design*, William J McKool, Access Control & Security Systems Integration; Aug 2000

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Supreme Court, U.S.
FILED
DEC 13 2004
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(12) (26)

Nos. 03-1500; 03-1693

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN
Petitioner,
v.
RICK PERRY, *et al.*
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MCCREARY COUNTY, KENTUCKY, *et al.*
Petitioners,
v.
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of *Amici Curiae*
American Humanist Association, Association of Humanistic Rabbis, American Ethical Union, Atheist Alliance International, Covenant of Unitarian Universalist Pagans, Equal Partners in Faith, Humanist Society, The Humanist Institute, HUUmanists, Institute for Humanist Studies, International Humanist and Ethical Union, Internet Infidels, National Center for Science Education, Secular Coalition for America, Skeptics Society, Society for Humanistic Judaism, Unitarian Universalist Association
In Support of Petitioner, Thomas Van Orden /Respondents, American Civil Liberties Union of Kentucky, et al.

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December 13, 2004

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INTEREST OF AMICI CURIAE[1]

The American Humanist Association is the oldest and largest humanist organization in the nation, dedicated to ensuring a voice for those with a positive, nontheistic outlook. Humanism is a progressive philosophy of life that, without supernaturalism, affirms the ability and responsibility of human beings to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism, and encourage the continued refinement of the humanist philosophy.

The American Humanist Association provides a unique viewpoint concerning the endorsement involved in the public posting of the Ten Commandments as well as the history of religious freedom in the United States because it represents a unique worldview that is without theism, holy scriptures, or absolute "commandments."

The Association of Humanistic Rabbis is the national professional organization of ordained rabbis serving congregations and other organizations within the humanistic Jewish movement.

The American Ethical Union is the federation of Ethical societies in the United States which together constitute the religious fellowship sometimes referred to as the "Ethical Culture Movement." The Ethical Culture movement is more than 128 years old with thousands of

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[1] The AHA files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici curiae*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

members nationwide. Internationally, the American Ethical Union is a founding member of the International Humanist and Ethical Union and is recognized by the United Nations as a non-governmental organization.

Atheist Alliance International is an organization of independent religion-free groups and individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Covenant of Unitarian Universalist Pagans is an independent affiliate of the Unitarian Universalist Association created to meet the needs of Pagan-identified Unitarian Universalists. CUUPS is dedicated to educating people about Paganism, promoting interfaith dialogue, developing Pagan liturgies and instructional materials, and fostering healing relationships with mother the Earth and all her children.

Equal Partners in Faith is a multi-racial national network of religious leaders and people of faith committed to equality and diversity. Its diverse faith traditions and shared religious values lead its members to affirm and defend the equality of all people, regardless of religion, race, ability, gender, sexual orientation or gender identity. As people of faith, its members actively oppose the manipulation of religion to promote inequality and exclusion.

The Humanist Society is a nonprofit, religious organization offering humanism as a personal, family, and community lifestyle. It certifies individuals in communities throughout the United States to provide ceremonial

observances of the significant occasions of life. Founded by former Quakers in 1939, the Humanist Society trains and ordains its own ministry, who upon ordination are then accorded the same rights and privileges granted by law to the priests, ministers, and rabbis of traditional theistic religions.

The Humanist Institute educates leaders, spokespersons, and advocates to benefit all elements of the Humanist movement in a three-year postgraduate certificate program. It also serves as a think tank to explore Humanism and its values in its present form and future evolution.

The HUUmanists are an independent affiliate of the Unitarian Universalist Association. Within this context HUUmanists practice, promote, enhance, and enjoy Humanism; provide a continental organization for humanists; and defend and protect humanism and freedom of thought. HUUmanists achieve these goals by arranging programs, forums, and lectures; publishing humanist writing to give voice to humanist values; encouraging the establishment of local humanist groups, and maintaining a humanist presence on the Internet. Founded in 1962 the HUUmanists' primary publications are the semi-annual journal *Religious Humanism* and the quarterly newsletter *HUUmanists News*.

The Institute for Humanist Studies is a think tank based in Albany, New York, whose mission is to promote greater public awareness, understanding, and support for humanism. The Institute specializes in pioneering new technology for the advancement of humanism and also engages in grassroots and legislative advocacy in order to further the rights and interests of the non-religious. Founded in 1999, IHS provides accessible and authoritative information about humanism to academia, the media, and the general public, while providing financial grants to other non-

religious groups in its effort to bring the humanist movement into a more cooperative relationship.

The International Humanist and Ethical Union is the world federation of humanist organizations. It is the sole world umbrella organization embracing humanist, atheist, rationalist, secularist, skeptic, laique, ethical cultural, freethought, and similar organizations worldwide. The IHEU has specialist consultative status at the United Nations in New York, Geneva and Vienna; general consultative status with the Council of Europe; and maintains operational relations with United Nations Educational, Scientific, and Cultural Organization in Paris.

The Internet Infidels run the *Secular Web* (www.infidels.org), the largest and most viewed website relating to atheism, humanism, freethought, and a scholarly critique of religion.

The National Center for Science Education is a nonprofit membership organization that supports the teaching of evolution in the public schools and opposes the presentation of religious views (such as creationism) in the science classroom.

The Secular Coalition for America's mission is to increase the visibility and respectability of nontheistic viewpoints within the United States and to protect and strengthen secular government as the best guarantee of freedom for all. Its members are national atheist, freethought, humanist, and secular organizations committed to cooperative action in areas of mutual interest and concern. The Coalition promotes liberties of conscience for the approximately thirty million American citizens who hold nontheistic worldviews.

The Skeptics Society is a nonprofit organization specializing in science education and research through a monthly science lecture series at the California Institute of Technology, the publication of *Skeptic* magazine, the publication of *Jr. Skeptic* magazine for students, the publication of the *Baloney Detection Kit* for teachers, the publication of the *Baloney Detection Books* for students, research on belief systems and the influence of culture and politics on science and science education, and the promotion of science and critical thinking.

The Society for Humanistic Judaism is the central body of the national humanistic Jewish movement. The Society's mission is to mobilize people to celebrate Jewish identity and culture consistent with a humanistic philosophy of life. The Society assists in organizing and supporting congregations and in providing a voice for its members.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom.

Amici file this brief with the consent of all parties. The letters granting consent are enclosed herewith.

SUMMARY OF ARGUMENT

The *Lemon* test is a sensible reflection of the values embodied in the Establishment Clause and remains an eminently workable and dynamic model to assess the constitutionality of government activity. Just as the

Establishment Clause itself embodies multiple values, so must the tests that this Court employs to decide acceptable Constitutional parameters. Because of our unique national history, it is now widely accepted that our government cannot legislate in a manner that endorses one religion over others, or religion generally. It is equally clear that our system of government is not designed to undertake actions, the principal purpose or effect of which is to advance religion, and that our government must not allow itself to become excessively entangled with religion or religious matters. As difficult as it may be to navigate the challenges presented when our collective civic and religious values conflict, it is imperative that we respect the constitutional values that give meaning to the Establishment Clause. Those values are adequately represented in the three-pronged *Lemon* test as it has evolved and been refined through this Court's decisions.

The Ten Commandment displays at issue in *McCreary* and *Van Orden* violate the Establishment Clause by failing to satisfy one or both of the religious purpose and effects tests set forth in *Lemon*. The "plainly religious" nature of the Ten Commandments justifiably elevates courts' skepticism of proffered legislative purposes for posting them, and this Court is also correct to examine the context, content, and history of Ten Commandment displays in order to decipher true legislative purposes. The nature of the analysis required under the Establishment Clause mandates this comprehensive examination, and early indications of religious or secular purposes clearly and importantly assist the courts in determining whether particular legislative actions are wholly, partly or predominantly secular or religious.

The purported purposes for the displays at issue in *McCreary*, while perhaps appearing secular in their final

version, are nevertheless predominantly religious. In *McCreary* this is exacerbated by the clear religious purpose of the original and second display efforts, and by the superficial and misguided attempt to characterize the historical contributions of the Ten Commandments to our nation's legal system. In *Van Orden* the purported purpose cannot be characterized as "bona fide, legitimate, and not a mere sham" because of the plainly religious nature of the Ten Commandments monument and the absence of a logical connection between the monument's display and the purported purpose.

The displays at issue in *McCreary* and *Van Orden* violate the "effects" prong of the *Lemon* test. When employing the "objective observer" standard, it is clear that the primary effect of the displays is to advance religion, specifically Christianity and Judiasm. It is also clear that surrounding the Ten Commandments with secular objects communicates government endorsement of religion, especially when, as is the case here, there is no effort to explain the historical, legal or cultural relevance of the Ten Commandments to the secular objects. The display of any version[2] of the Decalogue on public property under the circumstances presented in these cases has the clearly discernable effect of communicating government endorsement of religion (specifically monotheism). These displays also violate the "coercion" test that this Court employs in Establishment cases.

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[2] There are at least five distinctive versions of the Decalogue. This is important because the "deep theological disputes" that account for the different versions trigger further Establishment Clause infractions when one version is chosen to the exclusion of the others. *See* Steven Lubet, *The Ten Commandments in Alabama*, 15 Const. Comment. 471, 478 (1998) (concluding that "it takes naïveté ... to believe that a single rendition of the Ten Commandments could be considered universal and nonsectarian).

ARGUMENT

Under *Lemon v. Kurtzman* And Our Establishment Clause Jurisprudence, This Court Should Affirm The Sixth Circuit's Decision In *ACLU of Ky. v. McCreary County, Ky.* And Should Reverse The Fifth Circuit's Decision In *Van Orden v. Perry* Because None Of The Ten Commandment Displays At Issue Advance From A Legitimate, Bona Fide, Secular Purpose, And All Of Them Have The Effect Of Endorsing Religion.

I. The Lemon Test, As A "Fail One, Fail All" Three-Prong Test, Is A Sensible Reflection Of The Values Embodied In The Establishment Clause, And Remains An Eminently Workable And Dynamic Model To Assess The Constitutionality Of Government Activity.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I. At the heart of the Establishment Clause is the idea that, at a minimum, a state or federal government cannot establish or endorse religious belief or activity or engage in activity the principal effect of which is to endorse or advance religion. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989). "The Establishment Clause, at the very least, prohibits governments from appearing to take a position on questions of religious beliefs or from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.*

In the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court established a three-prong test to assess whether government activity is impermissible under the

Establishment Clause. Under the *Lemon* test, as originally formulated, reviewing courts are required to consider whether: (1) the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion. *Lemon*, at 612-13. This Court has used the *Lemon* test since the test's inception as a framework and guide for analysis on the constitutionality of government activity. This continued use of *Lemon* reinforces the underlying values of the Establishment Clause: that the government should not be acting with religious motivations, that its actions should not have the effect of advancing religion, and that it should not meddle or become entangled in religious affairs.

Although not perfect, the structure and approach of the *Lemon* test is a "common sense" methodology and remains the best tool for sorting through the inherently conflicting values in Establishment Clause cases. In any Establishment Clause case, a reviewing court is required to undertake the difficult task of determining where the line should be drawn between permissible First Amendment speech and/or activities covered by the Free Exercise Clause and impermissible government endorsement of religious activity under the Establishment Clause. The Establishment Clause provides very little guidance as to how this line should be drawn, but it does inspire the three necessary parameters to make this determination: (1) purpose, (2) effect, and (3) entanglement.

The *Lemon* test provides the best way for a court to go about making this decision, and it has been effective precisely because it forces a reviewing court to assess the constitutionality of legislative motivations and the results of their legislation, while continually respecting the maxim that the government should not involve itself in religious affairs.

In endeavoring to adhere to the mandates of the Establishment Clause, it was both necessary and helpful for the Court to create the three different methods of review set forth in *Lemon*.

For thirty-three years this Court has continued to use the *Lemon* test as the paramount guiding framework to determine whether the government's conduct is constitutional under the Establishment Clause.[3] The refining of the *Lemon* test over the years is proof that it is an eminently workable model to both assess the constitutionality of government conduct and foster an organic dialogue about the underlying social, religious, and constitutional values at play in Establishment Clause cases. Indeed, the adoption of the reasonable observer[4] standard in the endorsement/effects analysis illustrates the constantly evolving nature of our Establishment Clause jurisprudence and the flexible nature of the *Lemon* doctrine.

II. In *Van Orden* and *McCreary* The Predominant Purpose For Posting The Ten Commandments Was Religious, Thus Violating The Establishment Clause.

[3] *See, e.g. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Allegheny*, 492 U.S. 573; *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Stone v. Graham*, 449 U.S. 39 (1980); *Comm. For Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

[4] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Aguillard*, 482 U.S. 578; *Allegheny*, 492 U.S. 573.

A. The Court Must Examine The Content, Context, And History Of The Ten Commandments Displays In Order To Distinguish Sham Secular Purposes From Sincere Ones.

The Court's analysis of Appellants' actual purpose for posting the Decalogue must examine the content, context, and evolution of the displays at issue. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (stating that courts must examine the circumstances surrounding the governmental enactment and the conduct of the [appellants] throughout the dispute to determine primary purpose). This is because it is the "duty of the courts to 'distinguish a sham secular purpose from a sincere one.'" *Id.* (quoting *Wallace*, 472 U.S. at 75 at 75).

This comprehensive analysis must include an examination of the legislature's "original purpose" for erecting religious displays because it is the only way to effectively perform the purpose analysis under *Lemon*. *See Books v. City of Elkhart*, 235 F.3d 292, 295, 303-304 (7th Cir. 2000); *Gonzales v. North Tp. of Lake County, Ind.*, 4 F.3d 1412, 1420-21 (7th Cir. 1993); *Harris v. City of Zion*, 927 F.2d 1401, 1413-14 (7th Cir. 2001). The evolution of the actual display is helpful in distinguishing sham secular purposes from actual ones. This is important because, as the situation in *McCreary* demonstrates, it is not difficult to concoct a secular purpose in order to oppose removal of a religious display. This capacious examination is also necessary in situations like in *Van Orden*, where the purpose for erecting a specifically religious monument must be evaluated in the context of the conduct and activity occurring *after* a proposed secular purpose is offered. *See Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003).

B. The Content, Context, And History Of The Monument In *Van Orden* Clearly Shows That The Government's Purported Purpose Was A Sham And That The Primary Purpose Was Religious.

Because the purpose prong "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes," *Aguillard*, 482 U.S. at 592-94, it is reasonable that the "plainly religious" nature of the Ten Commandments would render their posting on public property facially suspect. Indeed, the specifically Christian and Jewish precepts, "I AM the LORD thy God," "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images, and "Thou shalt not take the Name of the Lord thy God in vain," tend toward the reasonable inference that the displaying government has a primarily religious (specifically monotheistic) purpose for displaying and maintaining the monument. *See id.* at 585 ("This intention may be evidenced by promotion of religion in general ... or by advancement of a particular religious belief.") (citing *Stone*, 449 U.S. 39).

Although the purported purpose in *Van Orden* was to "recognize and commend a private organization for its efforts to reduce juvenile delinquency," *Van Orden*, 351 F.3d at 178, the State cannot employ a religious means to serve otherwise secular interests. *See Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 265 (1963) (Brennan, J., concurring). Whenever a government entity can achieve a secular end through either secular or religious methods, and it chooses the religious method to accomplish its goals, its motivations are suspect. *See Allegheny*, 492 U.S. at 618 (Blackmun, J., concurring). Furthermore, in 1993, several years after the purported secular purpose was offered, the monument was

re-positioned "on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building ... *to reflect the role of the Commandments in the making of law*." *Van Orden*, 351 F.3d at 181 (emphasis added). This is analytically identical to the purposes rejected by the 6th Circuit in *McCreary* and the Supreme Court in *Stone*. Furthermore, in this situation it is simply illogical to grant that efforts to honor a private organization could or should justify the posting and maintaining of a religious monument in a manner that, as will be addressed below, constitutes a clear endorsement of religion.

C. The Content, Context, And History Of The Displays In *McCreary* Clearly Show That The Government's Purported Purpose Was A Sham And That The Primary Purpose Was Religious.

In *McCreary*, the first display only contained the Ten Commandments, the second display supplemented the first with textual excerpts celebrating religion, and the third display simply surrounded the Ten Commandments with new secular and patriotic items. *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 440-444 (6th Cir. 2003) ("*McCreary County II*"). At the beginning of this process the Kentucky officials (specifically Mr. Greene) professed his religious reasons for erecting the displays before conceding that the purpose was to "demonstrate America's Christian heritage," *McCreary County I*, 96 F.Supp.2d 667, 674 (E.D. Ky. 2000). The purported purpose was again amended "to demonstrate that the Ten Commandments were part of the foundation of American law and government ... [and] [to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the

Declaration of Independence and the foundation of our legal tradition.'" *McCreary County II*, 354 F.3d at 446-47.

Given the changing nature of the displays and purported purposes, it is clear that the only consistent motivation for the appellants was an effort to display the Ten Commandments on public property. Simply put, the main secular purpose that was proffered during the most recent stages of litigation was not present when the first and second displays were erected. It is difficult to find a better example of a "sham" purpose, and this Court should not give effect to Appellant's ad hoc efforts to cloak its predominantly religious motivations. *See Stone*, 449 U.S. 1104 (rejecting a conceptually identical sham purpose).

Just as the religious nature of the Ten Commandments has not changed since this court's decision in *Stone*, neither have the religious motivations of the Kentucky authorities. In *McCreary*, as in *Stone*, the "pre-eminent purpose" for posting the Ten Commandments was "plainly religious." *Stone*, 449 U.S. 39, 41 (1980). Where a "government intention to promote religion is clear," *Aguillard*, 482 U.S. at 585, this Court has consistently found the government action to violate the Establishment Clause despite government assertions of sincere nonreligious purposes. *See Stone*, 449 U.S. 39; *Aguillard*, 482 U.S. 578; *Wallace*, 472 U.S. 38; *Schempp*, 374 U.S. 203. The "sham" nature of Appellants proffered purpose is further illustrated by their utter "fail[ure] to integrate the Ten Commandments with a secular subject matter." *McCreary County II*, 354 F.3d at 453-54.

D. Respondents Have Failed To Exert Even A Mild Effort To Educate Citizens About The Ten Commandments As The "Foundation of American Law And Government," Or The "Moral Background Of The Declaration Of Independence And The Foundation Of Our Legal Tradition," Showing These Purported Secular Purposes To Be A Sham.

The most recent set of purposes advanced by Appellants in *McCreary* to justify the display of the Ten Commandments are sham purposes, partly because the current displays cannot reasonably effectuate their own purported purposes and partly because it does not appear that they were even designed to do so. These purposes are "to demonstrate that the Ten Commandments are part of the foundation of American Law and Government … [and] their significance in providing the 'moral background of the Declaration of Independence and the foundation of our legal tradition;'" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." *McCreary County II*, 354 F.3d at 446.

In light of the lack of evidence supporting the historical assertions of Appellant's proffered purposes and the absence of a comprehensive explanation that is required for the display to qualify as "an appropriate study of history, civilization, ethics, comparative religion, or the like" under *Stone*, 449 U.S. at 42, it is remarkable that the Appellants can actually suggest that their Ten Commandment displays were erected for remotely non-religious reasons. It would be extraordinarily difficult to accomplish these goals through even the most extensive exhibit of the Ten Commandments, let alone the displays erected by Appellants.

The displays in both the schools and the courthouses utterly fail to demonstrate even Appellants' own alleged connection between the Ten Commandments and American

law and government. Regarding the school installations, the prefatory text contains no factual information whatsoever. Instead it provides a brief resuscitation of the School Board's opinion that the documents in the displays "have had particular historical significance in the development of this country." *McCreary County II*, 354 F.3d at 450. Perhaps the only thing that is more vague and unsupported than this proffered opinion is the purpose it allegedly supports.

The text accompanying the courthouse display is equally conclusory. As support for the claim that the Ten Commandments "profoundly influenced . . . the formation of our country," it offers as "clear" evidence the Declaration of Independence's reference to a "Creator," *Id.* at 451, even though the term "Creator" is nowhere in the courthouse version of the Ten Commandments, *see id.* at 443, n. 2. The text then concludes with the overbroad and unsupported contention that "[t]he Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *Id.* at 446-47. This bald assertion was also devoid of any historical proof, substantiated commentary or plausible support. It is difficult to imagine a legitimate, bona fide purpose being so far off the mark from its proponent's efforts to effectuate it, but not as difficult as it would be (assuming they wanted to) for them to actually accomplish it.

E. The Purported "Historical" Purposes At Issue Are Difficult Or Impossible To Effectuate And Should Not Be Given Approval By This Court.

Appellants would have to sacrifice objectivity and intellectual honesty in order to demonstrate that the Ten Commandments are the moral background of the Declaration of Independence and the foundation of our law and

government. The most fundamental expressions of our system of government – the Declaration of Independence, the Constitution, and the Bill of Rights – have explicitly rejected the religious ideology propounded in the Ten Commandments. Appellants' stated purposes are a sham because they are simply untenable assertions the sole purpose of which is to provide secular cover for the State to advance a particular religious viewpoint.

The claim that the Declaration of Independence was created against the "moral background" of the Ten Commandments is simply untrue. Thomas Jefferson, the Declaration's author, rejected claims of the purported influence of Christianity on the common law.[5] In addition, the references in the Declaration to "Creator" and "God" did not refer to the God who gave Moses the Ten Commandments, but rather the "watchmaker" God of eighteenth century deism.[6] The same man who penned the immortal, self-evident truth that all men are created equal, surely did not believe in the God of the courthouse Commandments, who warns, "[F]or I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me." *McCreary County II*, 354 F.3d 443, n. 2.

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[5] Steven K. Green, "The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law," 14 J.L. & Religion 525, 547 (1999-2000) (quoting January 24, 1814, letter from Jefferson to Adams stating that, through "judicial forgery, the Bible, Testament, and all [Church doctrine was] ingulphed into the common law without citing any authority," in Lester J. Cappon, ed., *The Adams-Jefferson Letters* 421-25 (UNC Press, 1959)).

[6] *McCreary County II*, 354 F.3d at 452-53 (citing Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy and Theology* 24 (1998)). It is worth noting that Jefferson's rough draft, in which the capitalization was rather more standard than in the final version, refers to a lowercase "nature's god" and contains no reference to a "Creator."

The Constitution and the Bill of Rights reject the encroachment of religious influence even more strongly than the Declaration of Independence does. Neither mentions God at all, let alone refers to the Ten Commandments. Indeed, the first four commandments plainly contradict the First Amendment. Prohibitions against idolatry and worshipping other gods would violate the Free Exercise Clause, penalties for blasphemy would violate the Free Speech Clause and a mandate to keep the Sabbath holy would violate the Establishment Clause. The remaining six commandments are also not mentioned.[7] In fact, the only other discussion of religion is in Art. VI, which states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The Constitution's own text, therefore, defeats the bold historical assertions that Appellants advance in their purported purposes.

In addition to our nation's "foundational legal" documents, state legal systems, dating from the present back to colonial days, have been overwhelmingly secular. While Puritan New England did experiment with codes based on the Decalogue, by the early 1700s the colonies abandoned this approach for the English common law, which was not based on the Bible. Green, *supra* note 5, at 542-43. Professor Green's extensive historical inquiry led him to conclude that "[t]he historical record fails to support claims of a direct relationship between the law and the Ten Commandments." *Id.* at 558.

The texts of the most basic American documents and the history of American legal theory refute Appellants'

[7] The "Sundays excepted" clause in Art. I, Sec. 7, ¶ 2 has been grounds for debate, but this Court has previously explored the development of these laws, finding that their secular emphasis was predominant as early as the mid-1770s. *McGowan v. Maryland*, 366 U.S. 420, 433-37 (1961).

claims that the Ten Commandments provided the "moral background" for the Declaration of Independence and the foundation of our legal system. At best, the Ten Commandments influenced the founding fathers in their private lives, which they kept separate from their public offices Isolated, unsuccessful episodes of experimentation with biblical law do not show that the Ten Commandments had any direct or lasting influence on American legal traditions. Furthermore, Appellants offer no evidence that the Ten Commandments directly influenced the Declaration of Independence, as they allege in their purported purposes for displaying them. This Court should conclude that these are sham purposes, manufactured to camouflage purely or predominantly religious purposes because Appellants' have neither made an effort to achieve the purposes as stated nor shown how they could ever possibly do so.

III. The Posting Of The Ten Commandments On Public Property In *McCreary* and *Van Orden* Constitutes Government Endorsement Of Religion Because The Effect Of The Government Action Advances Religion, And An Objective Observer Would Believe That The Government Has Endorsed Religion.

A. A Reasonable Viewer Would Perceive The Display Of The Ten Commandments As A State Advancement And Endorsement Of Religion Favoring The Jewish And Christian Faiths And Their Display Therefore Has The Primary Effect Of Advancing Religion.

The "effects" prong of the *Lemon* test asks whether the government activity's "principal or primary effect" advances or inhibits religion. *Lemon*, 403 U.S. at 612-13.

This has been refined such that the courts ask whether an "objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of [religion]." *Wallace*, 472 U.S. 38 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 593 (showing the majority of the Court's implicit adoption of the endorsement test). In short, the endorsement test looks to whether the government has conveyed a message that religion is favored, preferred, or promoted over other beliefs.

In *Pinette*, this Court recognized that "an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring). Any reasonable observer would view monuments on the grounds of the state capital and displays on the courthouse grounds as public property, or at least endorsed by the government owner of the property. The objects' religious character is equally apparent, especially in the context of *Van Orden*. *See Books*, 235 F.3d at 302 ("Th[e] religious format is enhanced, not detracted from, by the etchings at the bottom of the tablet of the Stars of David and the Chi Rho symbol, a distinctive Christian symbol."). It would be unreasonable to believe that the religious items were on the monument without government permission.

B. Surrounding The Ten Commandment Displays With Secular Objects Does Not Neutralize The Religious Impact Of The Ten Commandments, But It Does Convey The Message That Christian And Jewish Religious Messages Have A Community Value Equal To Civic And Patriotic Messages, And That The Government Endorses Those Religious Messages.

In *Books*, a 7th Circuit case dealing with a display that was identical to the one at issue in *Van Orden*, the court rightly rejected the notion that surrounding the Decalogue with secular symbols renders it secular. *See Books*, 235 F.3d 292. Indeed, "the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion ... and civil government." *Id.* at 307. The reasoning of the 7th Circuit was endorsed by this Court in its denial of certiorari. *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001) (Stevens, J., statement respecting denial of cert.) (stating that "the reasons why this case is not one that merits certiorari are explained in detail in Judge Ripple's thoughtful opinion for the Court of Appeals.") The displays at issue in *McCreary* and *Van Orden* are similar in that they also are both surrounded with secular symbols.[8] Because of this, it is all the more important to appreciate the likelihood that the reasonable observer will interpret the displays as a State endorsement of religion.

In *Van Orden*, this likelihood is accelerated by the nature of the display as a "monument." Monuments are generally understood to refer to memorials, records, testaments, tributes, reminders, etc., and they are generally erected on public property to honor heroes, soldiers, leaders,

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[8] This similarity is explicitly apparent in the *McCreary* case, where the Decalogue is only one of several items in the display, and expressly relevant in *Van Orden*, because of the secular engravings on the actual monument and the secular items displayed in the vicinity of the monument. *See Van Orden*, 351 F.3d at 180-81 (relying upon the Decalogue's placement on the grounds of a National Historic Landmark among other secular monuments and memorials to show that a reasonable observer would not view the display as an endorsement of religion).

great events, etc. Given the nature of monuments, it is clear that there is a stark difference between artwork being placed in a publicly funded art museum[9] and a copy of the Ten Commandments being placed on the grounds of the state capital or the county courthouse, or in a schoolroom. In *Van Orden* the Ten Commandments monument was placed "on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building … to reflect the role of the Commandments in the making of law." *Van Orden*, 351 F.3d at 181. This placement would further support the reasonable person's conclusion that Texas endorses Judeo-Christian values, just as it would support the conclusion that the placement of any monument in such a prominent location indicates that the State "approved of the display and the full panoply of its religious content." *See Adland v. Russ*, 107 F. Supp. 2d 782, 786 (E.D. Ky. 2000) (finding that an identical monument placed on the capital grounds in Kentucky constituted government endorsement).

Like the monuments in *Books* and *Adland*, the one in *Van Orden* also clearly mingles religious and secular symbols without providing any sort of explanation for the apparent links "between religion … and civil government." *See Books*, 235 F.3d at 307. Because they "utterly fail[ed] to integrate the Ten Commandments with a secular subject matter," the government actors in *McCreary* not only failed to demonstrate a bona fide secular purpose but they also

[9] The District Court in *Van Orden* relied heavily on the facts that the Texas Capital Grounds are designated as a "National Historic Landmark" and the curator of the Capital is a "professional museum curator," in an attempt to analogize the grounds as a museum-type setting as described in *Allegheny*, or the Ten Commandments as a religious painting. Obviously, it is much more likely that a reasonable viewer would perceive government endorsement in the case of a religious monument featured prominently on capital grounds than they would while viewing a work of art in an art museum.

ensured that their Ten Commandments displays would cause a reasonable person to believe that they were witnessing a government endorsement of religion. *See McCreary County II*, 354 F.3d at 453-54.

C. The Fact That The Ten Commandments Were Privately Funded Does Not Render Them Secular Or Neutralize The Government Advancement Of Religion.

The fact that the Ten Commandments Monument in *Van Orden* was not purchased with taxpayer revenue is of no consequence when it comes to the Establishment Clause. *Stone*, 449 U.S. at 42 (holding that the "mere posting of the copies under the auspices of the legislature provides the "official support of the State … Government that the Establishment Clause prohibits." This makes sense, especially because the State of Texas took no steps to keep from endorsing the monument or to try to neutralize its plainly religious effect.

D. Posting The Ten Commandments On Public Grounds Constitutes Government Endorsement Of Certain Religious Sects To The Exclusion Of Religious Minorities And Nontheists.

The first line on the displays, "I AM the Lord Thy God," illustrates both the monotheistic and the sectarian character of the displays. By explicitly asserting the existence of a God, the Decalogue itself endorses theistic sects over nontheistic sects, such as Buddhism, as well as over the beliefs of agnostic and atheistic nontheists. This Court has acknowledged, and should continue to appreciate, the prominent existence of nontheists within the American religious landscape. *See e.g. Lee*, 505 U.S. at 617 (1992)

(Souter, J., concurring). Also, by using the singular "I AM," the Decalogue endorses monotheistic religious sects over polytheistic sects, such as Hinduism. Similarly, by referring to a masculine God over a feminine Goddess, the Decalogue represents a unique conception of the ultimate nature of the Deity that is not shared by all. The posting of the Ten Commandment displays in *McCreary* and *Van Orden* therefore impinge upon the respect for religious pluralism that "is commanded by the Constitution," *Allegheny*, 492 U.S. at 610, and could not be more antithetical to the values embodied in the Establishment Clause. As this Court stated in *Lynch*, "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. at 688.

E. Public Posting Of Any One Version Of The Ten Commandments Endorses Certain Religious Sects To The Exclusion Of Other Religions That Rely On Materially Different Versions Of The Ten Commandments.

Over twenty years ago this Court stated that the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths and no recitation of a supposed secular purpose can blind [the Court] to that fact." *Stone*, 449 U.S. at 41. This is significant because it acknowledges that the Ten Commandments (and monuments or displays like those at issue in these cases) exist as an object of faith for some people but not for others. However, it is also important not to overlook the discriminatory impact that this form of government endorsement has on "believers." As the lower court in *McCreary* observed, the posting of one version of the Ten Commandments to the exclusion of others causes the

"display to run further afoul of the Establishment Clause because it infringes upon the 'sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *ACLU of Ky. v. Pulaski County, Ky.*, 96 F. Supp. 2d 691, 701, n. 9 (E.D. Ky. 2000) (quoting *Allegheny*, 492 U.S. at 589).

Because "[t]he simultaneous endorsement of Judiasm and Christianity is no less constitutionally infirm than the endorsement of Christianity alone," this Court has "expressly required strict scrutiny of practices suggesting a denominational preference," *Allegheny*, 492 U.S. at 608-09, 614-15 (citing *Larson v. Valente*, 456 U.S. at 246). Both the nature of the Ten Commandments and the actual displays at issue in these cases indicate a denominational preference.[10] For example, in *Van Orden*, the monument on display presents the Protestant (with portions of the Jewish) version over the Catholic version. Additionally, to the extent that any of the Ten Commandments are embodied in the Quran, they are also not accurately represented in the version chosen on the Texas monument. *See The Ten Commandments in the Quran*, www.submission.org/quran/ten.html (last visited Dec. 2, 2004).

In *Stone* this Court rejected efforts to post the Decalogue on classroom walls partly because the first

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[10] The Ten Commandments, as commonly cited, appear twice in the Old Testament: in Exodus 20:1-17 and Deuteronomy 5:1-21. These two versions don't match perfectly. Furthermore, the versions of the "Ten Commandments" as they tend to appear on monuments don't include everything from these verses but tend to be abbreviated, condensed, or paraphrased with parts left out. The decision on which parts to include and which to leave out is necessarily a sectarian (even denominational) religious one; not all Christians, Jews, and Muslims would necessarily agree on the details of such abbreviations, condensations, or paraphrases.

"table" of the Ten Commandments solely concerns the religious duties of monotheistic believers. *Stone*, 449 U.S. at 41-43. However, it is important to acknowledge that even the "uncontroversial" phrases in the Decalogue, such as "Thou Shalt Not Kill," express an unconstitutional denominational preference. As the court in *Harvey v. Cobb County* aptly noted, "[t]hat is not what the text says in the original Hebrew, which says 'Thou shalt not murder.'" 811 F. Supp. 669, 672 (N.D. Ga. 1993), *affd*, 15 F.3d 1097 (11th Cir. 1994), *cert. denied*, 511 U.S. 1129 (1994). This has important theological implications because, by illustration, "Thou shalt not kill" is violated by capital punishment and war. *See e.g.* Owen Weatherly, *The Ten Commandments in Modern Perspective* (1961) at 92, 97.

In this situation, the decision to post one version of the Decalogue over others conveys the message from the State that the Protestant version is "correct" and the Muslim, Jewish, and Catholic versions are "incorrect." It is surely situations like these that were envisioned by the drafters of the First Amendment. And it is exactly for this reason that the government should avoid giving its imprimatur to *any* version of the Ten Commandments. Abrogation of this constitutional limitation could force the courts to have to decide between competing versions of the Ten Commandments, which would most certainly trigger entanglement problems under *Lemon*.

CONCLUSION

The decision of the Sixth Circuit in *McCreary* should be affirmed and the decision of the Fifth Circuit in *Van Orden*

should be reversed because the Ten Commandment displays at issue violate the Establishment Clause.

Respectfully submitted,

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No. 03-1693

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is The American Legion, chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans organization. The American Legion is a community service organization which now numbers nearly 2.7 million members – men and women – in nearly 14,000 American Legion Posts worldwide, including Puerto Rico, France, Mexico and the Philippines. Since its inception, the American Legion has maintained an ongoing concern and commitment to veterans and their families. The Legion was instrumental in the creation of the U.S. Veterans Bureau, now known as the Department of Veterans Affairs, and has continued to be an advocate for veteran's rights. In 1935, the American Legion established Boys State for the advancement of democratic and patriotic ideals to counter the Fascist inspired Young Pioneer Camps.

The American Legion continues its work today helping veterans survive economic hardship, secure government benefits, and promoting social stability and well-being for those that have honorably served our Nation's common defense. The Legion is dedicated to preserving American values, promoting patriotism and encouraging self-less service and sacrifice among the Nation's youth. In short, the American Legion seeks to honor the sacrifice for our country of those who have gone before us, support those who continue to sacrifice for our

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

country today and prepare those who will be called to sacrifice for all of us in the future.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to protect public displays of religious imagery and preserve our Nation's veterans memorials. Religious imagery has permeated American military culture throughout the history of the United States. Through veterans memorials and the religious imagery that marks so many memorials, the people of this Nation find solace and meaning for the sacrifice of our sons and daughters and are inspired by an eternal hope for the future of this country.

Lower federal courts have misused the endorsement test to destroy veterans memorials bearing religious imagery. Hecklers have successfully misused the endorsement test to remove any religious reference in the public square, doing great damage to this Nation's veterans memorials. This Court should protect public acknowledgement of religion and preserve our Nation's veterans memorials, which strive to honor the sacrifice of our sons and daughters and give meaning for such sacrifice and an eternal hope for generations to come.

ARGUMENT

I. America's war memorials honoring the sacrifice of millions deserve protection.

For more than two hundred and twenty-five years, millions of Americans have sacrificed their lives for their

country, their brethren, and their God. Their memory will long endure, etched in granite and marble, chiseled with a permanence that echoes their valiant lives. Each man and woman who fought our nation's wars and gave their lives in service is remembered in local, state and national war memorials, including those unknown soldiers who find their only recognition in the Tomb of the Unknowns, forever solemnly guarded, honored with a wreath[2] laying ceremony, with a simple inscription capturing their lives and their death – "Here Rests In Honored Glory An American Soldier Known But To God." (*Tomb of the Unknowns*, Arlington National Cemetery).

A. Religious imagery is an important part of American military culture.

The American landscape is laden with monuments and memorials of granite, marble and metal, invoking religious imagery, honoring those who sacrificed their lives for the rest of us. For many who have sacrificed their sons and daughters at the altar of freedom, such religious imagery serves as rallying points similar to that advanced by General Douglas MacArthur in 1962 in an address accepting the Thayer Award at West Point. "Duty, Honor Country. Those three hallowed words reverently dictate what you ought to be, what you can be, what you will be. They are your rallying points: to build courage, when courage seems to fail; to regain faith when there seems to be little cause for faith; to create hope, when hope becomes

[2] The wreath laying ceremony has ancient Greek religious origins. *See* <http://www.warmemorialsnsw.asn.au/laurel.cfm>.

forlorn."[1] General MacArthur went on to remind the Corp of Cadets "The soldier, above all other men, is required to practice the greatest act of religious training – sacrifice. In battle and in the face of danger and death, he discloses those divine attributes which his Maker gave when he created man in his own image. No physical courage and no brute instinct can take the place of the Divine help which alone can sustain him."

Religion, in some form, has always permeated military culture. Soldiers represent the cross-section of America, and the armed forces have been where cultural boundaries melt away and divides are overcome. Thus, the armed forces truly are the great melting pots of America, unified by common themes of American culture, including religious themes. Evidence of these common themes appear in war memorials, but also appear in military decorations, such as the Navy Cross and the Distinguished Flying Cross. Specifically, the Combat Medical Badge and the Expert Field Medical Badge are officially described as bearing a "greek cross." *Decorations, Medals, Ribbons and Similar Devices*, 69 Fed. Reg. 45114 (2004). The nature of armed combat for the survival of our civilization and

[1] Cadets at West Point are required to memorize this portion of General MacArthur's speech, which is recorded for the cadets in Bugle Notes, a collection of required memorized knowledge each cadet must master. Included in Bugle Notes is the song, *The Corps*. The opening for the song, required to be memorized by every cadet, is "The Corp! Bareheaded salute it, With eyes up, thanking our God." Each fourth-class cadet (freshman) or plebe is required to recite this song in its entirety, including the reference "thanking our God" whenever called upon to do so by upper-class cadets. In addition, cadets are required to memorize a traditional academy song, entitled *Benny Havens*, much depicted in the movie *The Long Gray Line*, which includes the line "Until on our last battlefield the light of heaven, shall glow."

national heritage requires us to search within ourselves and culture to identify the common threads that bind us together.

For more than two hundred years, one of those common threads is that we are a peculiarly religious people. *See generally* Alexis de Tocqueville, *Democracy in America* (Henry Reeve Translation, revised and corrected, 1829). That does not mean that every person who served or serves on the front lines has a religious dispensation, and certainly soldiers possess divergent views of religion and embrace different faiths. War monuments reflect this religious theme in part to honor the motivation of so many who fought and died for this nation's salvation, and in part to give purpose and meaning to the sacrifice of the youth of our nation for those who continue to mourn their loss, when such a purpose is not readily apparent. *See Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977) ("a monument with a cross is an appropriate symbol for sacrifice by men who gave their lives for their country in time of war").

The United States fought the Revolution to secure, among other things, religious freedom. The abolitionist movement, which gave meaning and purpose to many soldiers serving in the Army of the Republic, was a distinctly religious movement. The First World War saw the sacrifice of millions of young men, with little readily discernable meaning behind their death. In fact, in Europe, war memorials honoring those of the First World War usually feature a Cross of Sacrifice, in light of the desperation of the Europeans, especially the English, to find some reason for the terrible loss of life. World War II was fought as a righteous and desperate struggle to overcome and defeat a menacing and oppressive evil that

threatened to engulf entire continents. The Cold War saw the Evil Empire devoid of religion as the Communist State sandblasted Russian religious heritage out of the public square and out of the hearts of desperate men seeking to cling to something, but left with nothing but the State. The evils of slavery, fascism and brutal socialism were overcome by a people motivated at least in part by a deep conviction of the soul that might does not make right and that the eternal required them to sacrifice for the good of others. Such motivation deserves, at the very least, public acknowledgment.

While the intellectual elite may lay siege to such notions with the pen from the comfortable confines of the Ivory Tower, it has been the sacrifice of countless Americans willing to die for something greater than themselves that has secured that very freedom for their critics. As Justice O'Connor aptly articulated, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that ***sustains this Nation even today***." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring) (emphasis added).[4]

[4] Judge O'Scannlain captured the sentiments of the founding of our Nation and subsequent spirit of the importance of religion in public life in his concurring opinion in *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996).

B. Lower federal courts have abused this Court's Establishment Clause jurisprudence to unnecessarily remove war memorials by misusing the endorsement test.

A cross placed in a public park in 1934 by the Veterans of Foreign Wars in memory of those who died in World War I was ordered to be removed by the Ninth Circuit. *See Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). In *Buono*, the war memorial was designated as a war memorial to World War I by federal law. *See id.* at 549. The court declared that it was following the effects prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and Justice O'Connor's endorsement test to strike down the war memorial. *See id.* at 548. Yet, Justice O'Connor stated that "[f]acially religious references can serve other valuable purposes in public life as well." *Newdow*, 124 S. Ct. at 2322 (O'Connor, J., concurring). In fact, Justice O'Connor reminded the courts that she has consistently held "that such references 'serve, in the only ways reasonably possible in our culture, the legitimate secular purpose[] of . . . encouraging the recognition of what is worthy of appreciation in society." *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring)).

In *Buono*, the court of appeals employed flawed analysis that is not uncommon among federal courts. The court relied on the appearance of endorsement, improperly reducing the endorsement test to subjective form, transforming the test into a "heckler's veto," a result Justice O'Connor specifically cautioned against. *Newdow*, 124 S. Ct. at 2321 (O'Connor, J., concurring).

Other courts have likewise misapplied the endorsement test to eradicate veterans memorials designed to recognize "what is worthy of appreciation in society,"

namely the military service and personal sacrifice of veterans for something greater than themselves. *See, e.g.*, *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D. D.C. 1988) (a cross cannot serve as a veterans memorial without violating the endorsement test); *Gonzales v. North Township of Lake Country*, 4 F.3d 1412 (7th Cir. 1993). In *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996), the court of appeals relied on the endorsement test, but failed to properly analyze the facts from the reasonable person standard required by the test.

In fact, *Eugene* is the epitome of Establishment Clause catastrophe and a perfect example of why Establishment Clause jurisprudence must be constantly revisited by this Court. Acknowledgement is not the same as endorsement. The veterans memorial at issue, a cross, was "first condemned, then twice approved, and now once again condemned, all by well-intentioned judges seeking to apply the Establishment Clause of the United States Constitution." *Id.* at 620 (O'Scannlain, J., concurring). In fact, the veterans memorial in *Eugene* was originally vindicated for the very reason that it was a veterans memorial, and thus held a secular purpose, despite the fact that it bore a cross. *See Eugene Sand and Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 344 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977) ("an appropriate ceremony was conducted by the American Legion to dedicate the cross as the 'Veteran's War Memorial Monument'").

C. Without protection from this Court, countless veterans memorials will come under fire in the courts, dishonoring the memory of those who gave their lives for a cause greater than themselves and disheartening the millions of war veterans who find solace and understanding in such memorials.

There are numerous veterans memorials throughout the country that invoke religious imagery. For example, the Argonne Cross in Arlington Cemetery, erected in part through the efforts of the Argonne Unit American Legion, sits among nineteen pine trees that represent the Argonne Forest where so many American servicemen gave their lives. A simple inscription on the base of the cross reads: "IN MEMORY OF OUR MEN IN FRANCE 1917 1918."

The Canadian Cross of Sacrifice, also among the graves in Arlington Cemetery, is a twenty-four foot gray granite cross that dominates its surroundings with a bronze sword affixed to the cross. The Cross of Sacrifice was dedicated on Armistice Day, 1927, honoring those Americans, with great internal conviction, who joined the Canadian Armed Forces to fight in World War I before the United States joined the war. Subsequently, the monument was modified to honor those that served in World War II and the Korean War.

Photo provided by Arlington National Cemetery <http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html>

In fact, in Arlington Cemetery alone, there are numerous inscriptions of religious acknowledgement permanently displayed on public property. Chaplain's Hill Monument bears the inscription, "May God Grant Peace To Them And To The Nation They Served So Well." The Confederate War Memorial bears the inscription, "Victrix Causa Diis Placuit Sed Victa Caton," which means "The Victorious Cause was Pleasing to the Gods, But the Lost Cause to Cato" and depicts a woman extending a laurel wreath from ancient Greek religion to her fallen son. The Spanish-American War Monument bears the inscription, "TO THE GLORY OF GOD AND IN GRATEFUL REMEMBERANCE OF THE MEN AND WOMEN OF THE ARMED FORCES WHO IN THIS CENTURY GAVE THEIR LIVES FOR OUR COUNTRY THAT FREEDOM MIGHT LIVE." The Space Shuttle *Challenger* Memorial bears the inscription, " . . . put out my hand, and touched the face of God."

The Altar of the Nation, a national war memorial for all American war dead, is located in Rindge, New Hampshire at the Cathedral of the Pines. "It is comprised of stones donated as tributes from all United States Presidents since and including Harry Truman. It also contains stones from each of the fifty states and four territories and from Commanding Officers of America's Armed Forces, all incorporated into an Altar that symbolizes the unity and strength of grateful people."[5] In 1962, the Fraternal Order of Eagles donated a Ten Commandments monolith, which is prominently displayed in the Cathedral of the Pines. "The Presidents of the United States and each of the

[5] <www.cathedralpines.com>.

governors of the 50 states and four territories have had their tributes to the American War Dead placed at the Altar of the Nation on Memorial Day."[6] In 1967, the Women's Memorial Bell Tower was dedicated at the entrance to the Cathedral of the Pines and was the first veterans monument in the United States specifically honoring women who gave their lives for their country. This incredible war memorial is even more fascinating as a living memorial reminding all Americans of the great pluralism and common bonds we all share.[7]

This war memorial features a very large Ten Commandments display and a religious altar, and is among the Cathedral of the Pines, and bears a cross and crucifix in prominent locations. Yet, secular and various faith groups are apparently not offended. In fact, a veritable cross section of America used the war memorial in 2004 for meetings, memorial services, and for a Meditational Labyrinth Walk. Veterans of Foreign Wars, the 101st Airborne Division, Daughters of Scotia, Masons, United Church of Christ, Greek Orthodox Divine Liturgy, Baha'i Faith, a Baptist church, the United States Air Force band, the Daughters of the American Revolution, the Assembly of God, Christian Scientists, the Loyal Order of the Moose, the International Order of the Rainbow for Girls, and others made use of the facility in 2004.

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[6] *Id.*

[7] The real beauty of this memorial is its truly pluralistic appeal to people of many faiths and secular organizations. Nothing captures its living memorial quality better than the brief schedule of events posted on the website, which is included in the appendix of this brief. The schedule itself is a powerful testament to the pluralism of this Nation, and the common bonds sealed with the sacrifice of our youth in time of war.

The prominent displays of a crucifix and the cross at the Altar of the Nation have not deterred the Annual Jewish Service being conducted there for the past fifty-eight years. The religious imagery of this living war memorial serves as a unifying force for our culture, and indeed our Nation. Yet, many of the same arguments being proffered to ban the display of the Ten Commandments in McCreary County would equally ban the Ten Commandments and Altar of the Nation in the Cathedral of the Pines. This cannot be allowed to happen.

In the capitol, the Peace Monument stands as a forty-four foot high monument in the circle to the west of the Capitol at Pennsylvania Avenue and First Street, N.W. This war memorial was erected in 1877-78 to commemorate the naval deaths at sea during the Civil War. Among the ancient Greek classical figures, Mars, the god of war and Neptune, the god of the sea are depicted, as well as the figure Victory, holding a laurel wreath. The Peace Memorial in Gettysburg bears the inscription, "With Firmness In The Right As God Gives Us To See The Right – Lincoln." Countless small towns and communities across the country have erected veterans memorials that bear religious inscriptions or invoke religious imagery. The City of Chicago dedicated the City Hall Memorial Plaque, a World War I and II memorial that bears the image of an angel. Blooming Grove, Texas built a Korean and Vietnam War Memorial that bears an inscription from the Book of Ecclesiastes. Such is the nature of thousands of veterans memorials across the country.

For some courts, these war memorials must be torn down. It is disheartening and distressing to think that Arlington Cemetery must be gutted because there are those who are offended by the religious imagery. If we

cannot even acknowledge this country's religious heritage in public to honor those who sacrificed their lives for something greater than themselves, how can we ever as a Nation look into the face of youth to call upon it to once again return to the alter of freedom and offer the same sacrifice given by generations before? Apparently, the heckler would prefer the sound of the beep, beep, beep of a crane signaling the collapse of the Cross of Sacrifice at Arlington Cemetery, rather than the respectful silence of those who approach the Cross, remember our fallen soldiers, and say a prayer for them and our country.

The wound grows deeper when such a heckler successfully challenges war memorials of those who died to protect the very freedom the heckler allegedly invokes to sandblast the memorial from history. At the same time, the veteran is called upon to avert his eyes when one burns the flag that symbolizes for many the cause for which brave men and women gave their lives.[8] The flag, like war memorials, maintains a vigilant watch over our Nation, reminding each of us of our national heritage and common bonds. Indeed, our National Anthem, inspired by the flag, as noted by Chief Justice Rehnquist in *Texas v. Johnson*,[9] captures the significance of the flag and religious imagery in our national identity in its first and

[8] Perhaps for veterans memorials, just as for the American Flag, there are those who identify the intrinsic value of such symbols that give them pause before rendering them disposable and devoid of eternal meaning. *See Texas v. Johnson*, 491 U.S. 397, 436-39 (1989) (Stevens, J., dissenting); *Id.* at 421-435 (Rehnquist, C.J., dissenting, O'Connor, J., joining).

[9] *Id.* at 423.

second verses.[10] The Court should provide protection to the war memorials of this country, as they stand vigilantly guarding the sacred honor of those who made the ultimate sacrifice for this Nation and give comfort and purpose for those they left behind.

II. This case represents an opportunity for this Court to affirm that acknowledgment of religion as worthy of appreciation and as a source of public good does not rise to the level of endorsement that violates the Establishment Clause.

The key to the endorsement test being properly applied is the reasonable observer standard consistently articulated by Justice O'Connor. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 781 (1995). This standard guides courts to avoid the "heckler's veto," and adjudicate that mere acknowledgement of religion does not rise to the

[10] The second verse, not often sung, is imbued with religious imagery and required to be memorized and recited along with the first verse by cadets at the United States Military Academy.

> Oh, thus be it ever when freemen shall stand between their loved homes and wild war's desolation;
>
> Bless'd with vict'ry and peace, may the heav'n-rescued land Praise the pow'r that hath made and preserv'd us a nation!
>
> Then conquer we must, when our cause it is just. And this be our motto: "In God is our trust!"
>
> And the Star-Spangled Banner in triumph shall wave, O'er the land of the free and the home of the brave.

level of an Establishment Clause violation. *See Newdow*, 124 S. Ct. at 2321 (O'Connor, J., concurring) (citing *Pinette*, 515 U.S. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion") (emphasis in original)).

A. The Establishment Clause should not be used as a tool to crush the aspirations and hopes of those who long for an eternal purpose for the sacrifice of so many.

Veterans memorials exist to honor those who sacrificed their lives for something greater than themselves and serve as rallying points for survivors and others to remember their sacrifice and find solace, peace and reason for such loss. Religious imagery serves to acknowledge that most people served by the memorial rest their eternal hopes on God or some religious sentiment. No memorial, however brilliantly conceived, can represent the sentiments of all those it means to serve. But, the Establishment Clause should not be misused as a tool to reduce such sentiments to the lowest common denominator of sadness and gloom. Memorials exist not just to convey that the youth perished, end of story. Most people crave more than that; they crave an eternal hope that those who perished did not die in vain. While freedom is quickly extinguished without those who are willing to lay their lives on the line for something greater than themselves, the personal comfort and enjoyment derived from so called "freedom"-esque adventures such as viewing online pornography or watching the protected speech of a topless dancer offer little warmth for the soul of the loved ones of those who made the final sacrifice.

Our homes, our communities, our Nation demand that we elevate the cause of those who gave their lives for the rest of us to the highest platitudes of our cultural tradition. As a Nation, we cannot ignore the differences that define the uniqueness of American life, including religious diversity and the lack of religious sentiment among some. However, we cannot allow that diversity to swallow-up our uniquely American religious heritage, grounded in historical roots and fertilized with the sacrifices of our most treasured belongings, our sons and daughters.

Those who came before died for a reason. It is not sufficient to cast their sacrifice upon the trash heap of history by refusing to give an eternal significance to the brutality inflicted by war upon generations. We owe it to those who sacrificed their lives and those who mourn to acknowledge the common thread that binds each generation of Americans who have fought and died for the preservation of this great Nation and give eternal significance to the sacrifice made that the temporal occasionally regards dismissively as rather pointless. In a day and age when protesters call out that our brave soldiers die daily in Iraq for nothing but oil, it is incumbent upon the courts to give some leeway to those communities and governmental bodies that seek to inspire in citizens and future generations a reason to make the ultimate sacrifice.

B. Recognizing religion as a positive social force does not violate the endorsement test.

The acknowledgement of religion as an important historical factor in the development of American culture, as viewed by the reasonable observer, imbued with all knowledge, is not an Establishment Clause violation. Further, giving acknowledgment to religion or a particular

religious sentiment does not, on its own, give the reasonable observer cause to feel disenfranchised. Indeed, praise of one does not equate to a denigration of another. To acknowledge the good in a particular religious sentiment does not render the countless other sentiments or lack of sentiment for anything in particular insignificant, and cannot diminish the perceived worth of any individual. For the Court to rule that mere acknowledgement of a religious sentiment as a public good is impermissible would do nothing more than silence forever the graves of those who sacrificed themselves for God and Country, for whom the memorial speaks its eternal message.

The American Legion beseeches this Court to carefully weigh its words in a decision in this case. Federal courts across the country are doing great harm through their misuse of Establishment Clause jurisprudence. This Court should restrain them. The great and ultimate sacrifice of the sons and daughters of this Nation from the founding to the present hour in Iraq demands that this Court tread cautiously when its decision may have a far-reaching and eternal impact in how we honor their sacrifice and try, as a Nation, to find comfort and solace in their remembrance. The veterans memorials of this country were not lightly constructed, nor were they intended as advancements of a particular creed or sentiment. Instead, they represent this Nation's best efforts to give meaning to a cause that cannot alone be sustained by empty rhetoric and talk of abstract freedom. Veterans gave their best to this Nation so that it might not perish from the Earth, but rather long endure. At the very least, this Court can and should honor their sacrifice by preserving the remnants of their mark on us all, the veterans memorials.

CONCLUSION

This Court should reverse the decision below and affirm that public acknowledgement of religion and its importance in our society is not endorsement. In addition, this Court should be mindful of the travesty of veterans memorials being bulldozed in the name of heckler's justice, and secure for such veterans memorials protection from overzealous courts.

Respectfully submitted,

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App. 1

Cathedral of the Pines

Schedule of Events

2004 Services

The Cathedral is available for Weddings, Memorial Services, Religious Services, Baptisms, Bar and Bat Mitzvahs, Services for Fraternal Groups, Veterans Groups, and Baccalaureate Services.

The Cathedral Hill Top House will be open during the winter months (November through April) by reservation for meetings, weddings and services.

Call prior to scheduled services for confirmation of schedule.

APRIL

April 11 – Sunday – 5:30 AM – **Easter Sunrise Service** with the Rev. Benjamin Swan, Pastor Monadnock Full Gospel Church, officiating

MAY

May 2 – Sunday – 11:00 AM – Loyalty Day Service. **Veterans of Foreign Wars and Ladies Auxiliary** of District 5, West Swanzey, NH. Clarence Nelson, arranging.

May 9 – Sunday – 11:00 AM – **Cornerstone Outreach Ministries.** Blessing of the Bikers. The Joseph Delio, officiating

May 15 – Saturday – 10:00 AM – **101st Airborne Division,** Rededication Ceremony. Robert M. Delia, CSM, U.S. Army (Ret.), arranging

May 16 – Sunday – 10:00 AM – **United Commercial Travelers,** Memorial Service. Ron Rugiauge, arranging.

– 1:00 PM – **Fraternal Order of the Eagles.** 42nd Annual Memorial Service. Joe Markevich, Secretary, Connecticut State Aerie, arranging.

May 22 – Saturday – 9:00 AM – **Southern New England Conference "Pathfinders."** Pastor Bob Saunders, officiating.

– 1:00 PM – **WAVES.** Memorial Service. Barbara Rice, arranging

May 23 – Sunday – 1:00 – 3:00 PM – Meditational **Labyrinth Walk** – Carol Renwick and Yvonne Dunetz, arranging.

May 27 – Thursday – 4:00 PM – Baccalaureate Service. **The Winchendon School,** Winchendon, MA. Marilyn LaBelle, arranging.

May 30 – Sunday – 2:00 PM – **Annual Memorial Day Observance** for all American War Dead.

JUNE

June 6 – Sunday – 3:00 PM – **Daughters of Scotia.** Scottish Service. The Rev. Dr. Gerald G. Wyrwas, officiating. Ethel M. Wyrwas, arranging.

– 4:00 PM – **Central Association, Massachusetts Conference, United Church of Christ.** Worship Service. Jane Clarke, arranging.

– 6:00 PM – Baccalaureate Service. **Mascenic Regional High School**, New Ipswich, NH. Cheryl Bellow, arranging.

June 9 – Wednesday – 9:30 AM – **Masters Christian Academy.** Worship Service. Lori Applegarth, arranging.

June 20 – Sunday – 11:00 AM – **Charles Street AME Church,** Dorchester, MA. Worship Service. Sarah Claytor, arranging.

– 2:00 PM – **Third Annual Wedding Vow Renewal Service**. Sponsored by Cathedral of the Pines. To schedule your renewal of vows, please call (603) 899-3300. Sandy Pastor, Director of Programs arranging.

June 27 – Sunday – 11:00 AM – **Annual Masonic Service (55th year).** Sponsored by Altemont Lodge #26 & Grand Lodge of NH. Nils Bergstrom, arranging.

– 3:00 PM – **New England Grange Family Service.** Sponsored by New Hampshire State Grange. Chaplain Hugh Clark, officiating and arranging.

JULY

July 4 – Sunday – 11:00 AM – **Greenfield Congregational Covenant Church,** of Greenfield, NH. Worship Service. The Rev. Daniel Osgood, officiating and arranging.

July 11 – Sunday – 10:00 AM – **Greek Orthodox Divine Liturgy.** Chris Booras, arranging.

– 3:00 PM – **Polish National Catholic Church.** Eastern Diocese Vesper Service. The Very Rev. Joseph Soltysiak, assisting and arranging.

July 18 – Sunday – 10:00 AM – **Church of Christ** of Brookline, NH. Worship Service. Dr, David W. Smith, officiating.

– 3:00 PM – **Baha'i Faith of Peterborough, NH** Coordinated by the Baha'i's of the Monadnock Region. Julie Swan, arranging.

July 24 – Saturday – 1:00 PM – **Concord Baptist Church,** Boston, MA. Kate Days, arranging.

July 25 – Sunday – 10:00 AM – 3:00 PM – **Cathedral Gardens Tour.** A guided tour of the beautiful Cathedral Gardens sponsored by Cathedral of the Pines. Barbara Hadsell, arranging

AUGUST

August 1 – Sunday – 10:00 AM – **First Congregational Church of Rindge and First Church in Jaffrey, U.C.C.** Combined Worship Service. The Rev. James Melhorn and William Beardslee, arranging.

– 11:00 AM – **The New England Pythians Knights & Sisters.** Memorial Service. Larry Ackerson, arranging.

– 3:00 PM – **Annual Jewish Service.** (58th year.) Rabbi Seth L Berstein, D. Min., arranging.

– 7:00 PM – **Fleur de Lis Camp,** Fitzwilliam, NH. Episcopal Evening Worship. Elizabeth Young, Director, arranging.

August 5 – Thursday – 9:00 AM – **National Havurah Summer Institute 2004.** Christine Oliger, arranging.

August 7 – Saturday – 1:00 PM – **Odd Fellows & Rebekahs** (52nd year) Memorial Service sponsored by Massachusetts Rebekah Assembly, IOOF. Barbara McLaren, arranging.

August 8 – Sunday – 10:00 AM – **Monadnock Bible Baptist Church.** Worship Service. The Rev. Thomas Peragallo, officiating and arranging.

– 1:30 PM – **Cranston Senior Guild** of Warwick, RI. Chaplain Mel Levine, officiating. Phyllis Solod, arranging.

August 14 – Saturday – 11:00 AM – **Amaranth Service.** Sponsored by Nashoba Valley Court #13. The Rev. David Forry, officiating. Clark W. Page, Sr., Royal Patron, arranging.

August 15 – Sunday – 1:00 PM – **Rosicrucian AMORC,** Johannes Kelpius Lodge. Rededication Service. Moses Debediana, arranging.

– 3:00 PM – **North American Spiritualist Conference.** Mary Lou Baumhoff, arranging.

– 4:30 PM – **U.S.A.F. Band of Liberty New England Winds Woodwind Quintet** from Hanscom AFB, MA. Craig Matta, arranging.

August 21 – Saturday – 11:00 AM – **Daughters of the American Revolution.** Service Sponsored by New Hampshire Society DAR. Chaplain General Mary Lou James, speaker. Barbara Langley, Conference Chairman, arranging.

August 22 – Sunday – 3:00 PM – **Fitchburg Assembly of God,** Fitchburg, MA. Worship Service. The Rev. Russell Grant, officiating and arranging.

August 29 – Sunday – 3:00 PM – **Christian Science Healing and Testimony Service.** Don Alusic, arranging.

SEPTEMBER

September 6 – Monday, Labor Day – 10:00 AM – **AA Open Meeting**

September 11 – Saturday – 11:00 AM – **Loyal Order of Moose.** 41st Annual Memorial Service. Tom Buck, Secretary, arranging.

– 7:00 PM – **Prayer Service** in observance of the "Attack on America," September 11th, 2001

September 12 – Sunday – 1:00 PM – **International Order of the Rainbow for Girls.** Massachusetts Grand Assembly. Sandra J. Marshall, Supreme Inspector in Massachusetts, arranging.

September 19 – Sunday – 11:00 AM – **New England Lions and Lioness Council,** Present & Past District Governors, Memorial Service. Ed Lecius, arranging.

– 1:00 PM – **Hospice at HCS.** Memorial Service. Lorraine Bishop, arranging.

September 24 – Friday – 7:30 PM – **Elisabeth von Trapp in concert with Erich Kory, cellist.** inside the Hilltop House. Tickets are $15.00 with limited seating, so call (603) 899-3300 for yours!

September 26 – Sunday – 11:00 AM – **Second Congregational Church, UCC, Wilton, NH.** Worship Service. Deacon Richard Carlson, arranging.

– 3:00 PM – **First Baptist Church of Boston.** Worship Service. Deacon Melvin Jennison, officiating and arranging.

OCTOBER

October 2 – Saturday – 6:00 PM – **Blessing of God's Creatures** large and small in the St. Francis of Assisi Garden. Sandy Pastor, arranging.

October 10 – Sunday – 3:00 PM – **Cornerstone Outreach Ministries.** Worship Service. The Rev. Joseph Delio, officiating.

NOVEMBER

November 11 – Thursday – 10:45 AM – **Veteran's Day** observance. Rindge Veteran's Association Honor Guard and Color Guard.

(15)

No. 03-1693

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

McCREARY COUNTY, KENTUCKY;
JIMMIE GREENE as McCreary County Judge Executive;
PULASKI COUNTY, KENTUCKY; DARREL BESHEARS
as Pulaski County Judge Executive,

Petitioners,

v.

ACLU OF KENTUCKY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS BRIEF OF AMERICAN LIBERTIES INSTITUTE, CHRISTIANS REVIVING AMERICA'S VALUES AND DON SWARTHOUT IN SUPPORT OF PETITIONERS

FREDERICK H. NELSON, ESQ.*
AMERICAN LIBERTIES INSTITUTE
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EDITOR'S NOTE

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INTEREST OF *AMICI*[1]

American Liberties Institute, Christians Reviving America's Values and Don Swarthout file this *amici curiae* brief in support of the Petitioners to assist this Court in rendering a decision in the instant case. American Liberties Institute is currently litigating cases which present issues that are similar to that which is pending before this Court in this case. American Liberties Institute is often contacted to assist both government and private parties in an effort to balance religious expression within a historical framework. American Liberties Institute, Christians Reviving America's Values and Don Swarthout submit this *amici curiae* brief in support of Petitioners in order to safeguard religious speech within a public fora.

American Liberties Institute is a non-profit civil liberties education and legal defense organization created to defend and protect constitutional liberties. American Liberties Institute's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms. As part of advancing American Liberties Institute's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Christians Reviving America's Values is a non-profit organization whose objectives are to educate the public about America's Christian heritage and to assist individuals and organizations in safeguarding constitutional liberties similar to those in danger of being infringed upon in the instant case.

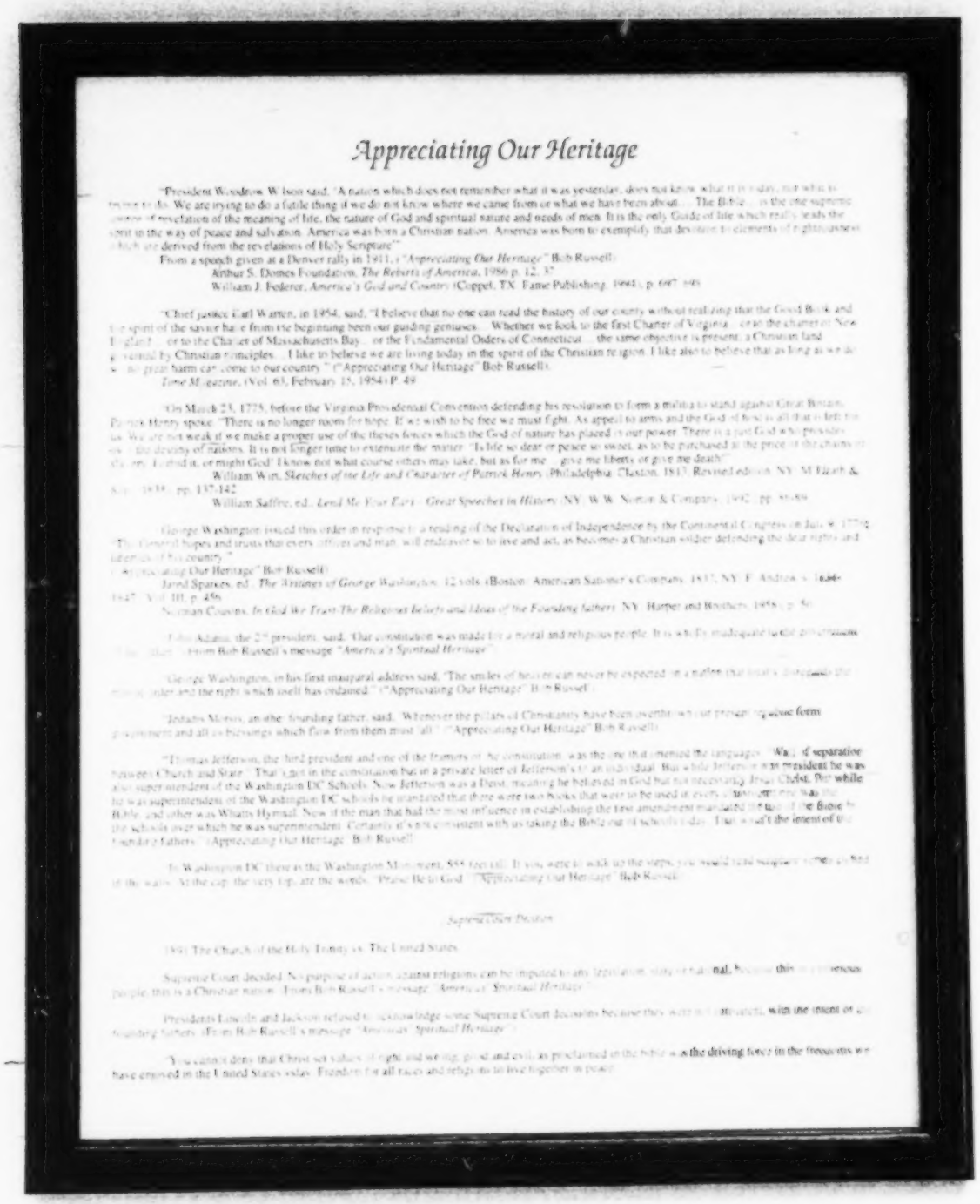
---

[1] This brief is authored solely by counsel for *amici curiae*. This brief is filed with permission of the Petitioners and a copy of the letter of consent is filed herewith. The Respondent has filed a global consent letter with the Court.

SUMMARY OF THE ARGUMENT

The purpose of this *amicus curiae* brief is to demonstrate to the Court, through a sampling of photographs, some of the historical documents that were erected in both McCreary and Pulaski County Courthouses. The sampling of photographs of the historical documents clearly demonstrate to the Court that the Ten Commandments were properly erected within a historical context in both courthouses. Accordingly, the Sixth Circuit should be reversed.

McCreary County Courthouse Seal 1912 in a courtroom of McCreary County Courthouse



Appreciating Our Heritage

"President Woodrow Wilson said, 'A nation which does not remember what it was yesterday, does not know what it is today, nor what it is to do. We are trying to do a futile thing if we do not know where we came from or what we have been about.... The Bible ... is the one supreme source of revelation of the meaning of life, the nature of God and spiritual nature and needs of men. It is the only Guide of life which really leads the spirit in the way of peace and salvation. America was born a Christian nation. America was born to exemplify that devotion to elements of righteousness which are derived from the revelations of Holy Scripture'"

From a speech given at a Denver rally in 1911, c "*Appreciating Our Heritage*" Bob Russell:

Arthur S. Domes Foundation, *The Rebirth of America*, 1986 p. 12, 37

William J. Federer, *America's God and Country* (Coppel, TX: Fame Publishing, 1994), p. 667, 668

"Chief justice Earl Warren, in 1954, said, 'I believe that no one can read the history of our country without realizing that the Good Book and the spirit of the savior have from the beginning been our guiding geniuses.... Whether we look to the first Charter of Virginia ... or the charter of New England ... or to the Charter of Massachusetts Bay ... or the Fundamental Orders of Connecticut ... the same objective is present: a Christian land governed by Christian principles.... I like to believe we are living today in the spirit of the Christian religion. I like also to believe that as long as we do ... no great harm can come to our country.'" ("Appreciating Our Heritage" Bob Russell).

Time Magazine, (Vol. 63, February 15, 1954) P. 49

"On March 23, 1775, before the Virginia Providential Convention defending his resolution to form a militia to stand against Great Britain, Patrick Henry spoke. 'There is no longer room for hope. If we wish to be free we must fight. As appeal to arms and the God of hosts is all that is left for us. We are not weak if we make a proper use of the theses forces which the God of nature has placed in our power. There is a just God who presides ... the destiny of nations. It is not longer time to extenuate the matter. "Is life so dear or peace so sweet, as to be purchased at the price of the chains of slavery. Forbid it, or might God! I know not what course others may take, but as for me ... give me liberty or give me death!'"

William Wirt, *Sketches of the Life and Character of Patrick Henry*, (Philadelphia: Claxton, 1817. Revised edition, NY: M Fisch & Co., 1836), pp. 137-142

William Safire, ed., *Lend Me Your Ears - Great Speeches in History*, NY: W.W. Norton & Company, 1992, pp. 93-99

George Washington issued this order in response to a reading of the Declaration of Independence by the Continental Congress on July 9, 1776: "The General hopes and trusts that every officer and man will endeavor so to live and act, as becomes a Christian soldier defending the dear rights and liberties of his country."

("Appreciating Our Heritage" Bob Russell)

Jared Sparkes, ed., *The Writings of George Washington*, 12 vols (Boston: American Stationer's Company, 1837, NY: F. Andrews, 1846-1847), Vol. III, p. 456

Norman Cousins, *In God We Trust The Religious beliefs and Ideas of the Founding fathers*, NY: Harper and Brothers, 1958, p. 50

John Adams, the 2nd president, said, 'Our constitution was made for a moral and religious people. It is wholly inadequate to the government of any other.' (From Bob Russell's message "*America's Spiritual Heritage*")

George Washington, in his first inaugural address said, 'The smiles of heaven can never be expected on a nation that disregards the eternal rules of order and the rights which itself has ordained.' ("Appreciating Our Heritage" Bob Russell)

Joshua Morris, an other founding father, said, 'Whenever the pillars of Christianity have been overthrown or greatly weakened, every form of government and all its blessings which flow from them must fall.' ("Appreciating Our Heritage" Bob Russell)

"Thomas Jefferson, the third president and one of the framers of the constitution, was the one that invented the language 'Wall of separation between Church and State.' That's not in the constitution but in a private letter of Jefferson's to an individual. But while Jefferson was president he was also superintendent of the Washington DC Schools. Now Jefferson was a Deist, meaning he believed in God but not necessarily Jesus Christ. But while he was superintendent of the Washington DC schools he mandated that there were two books that were to be used in every classroom: the Holy Bible and other was Whatts Hymnal. Now if the man that had the most influence in establishing the first amendment mandated the Holy Bible in the schools over which he was superintendent. Certainly it's not consistent with us taking the Bible out of schools today. That wasn't the intent of the Founder's fathers." ("Appreciating Our Heritage" Bob Russell)

In Washington DC there is the Washington Monument, 555 feet tall. If you were to walk up the steps you would find inscription carved in the stone. At the cap, the very top, are the words, "Praise Be to God." ("Appreciating Our Heritage" Bob Russell)

Supreme Decision

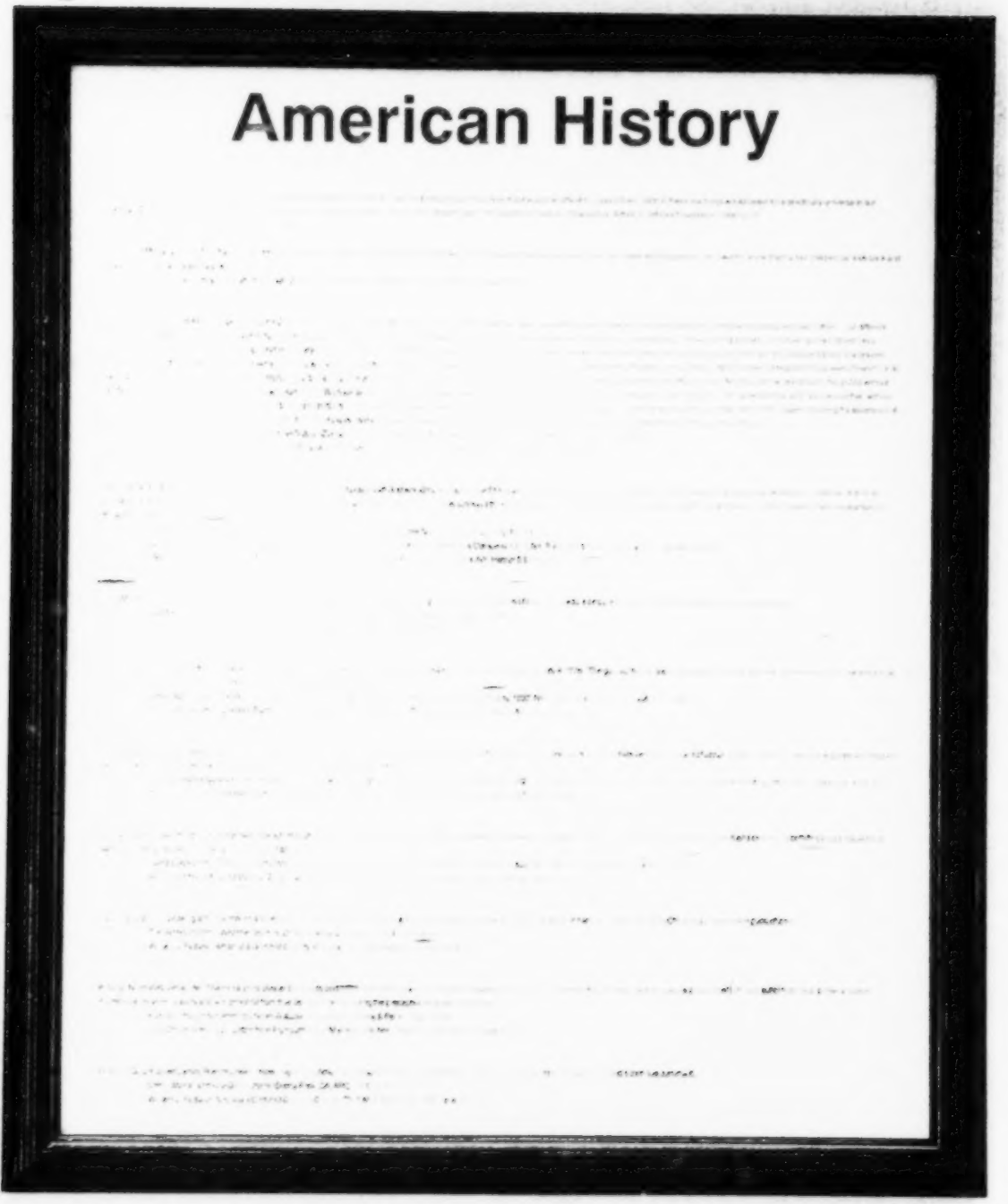
1892 The Church of the Holy Trinity vs. The United States

Supreme Court decided: No purpose of action against religions can be imputed to any legislation, state or national, because this is a religious people, this is a Christian nation. (From Bob Russell's message "*America's Spiritual Heritage*")

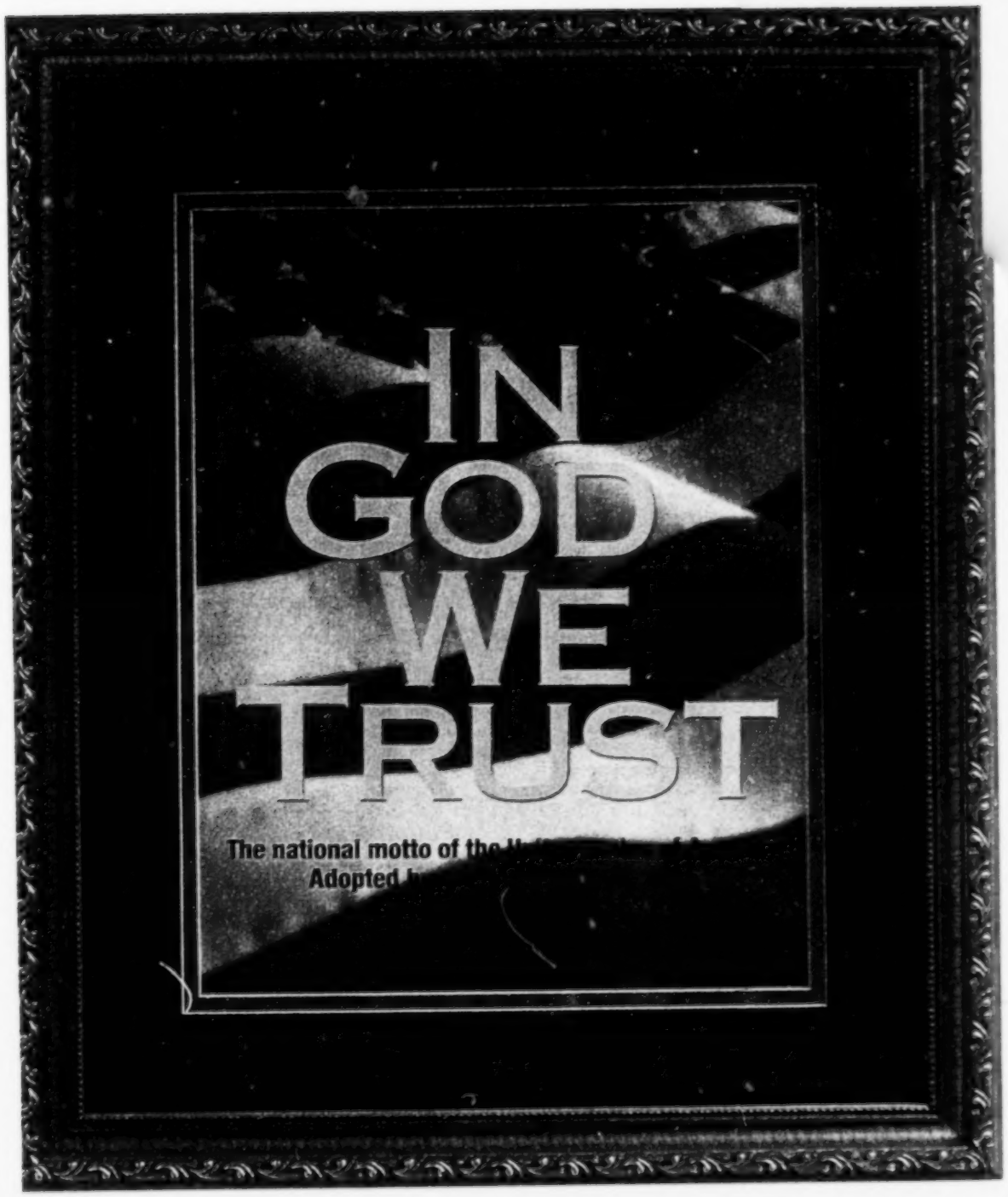
Presidents Lincoln and Jackson refused to acknowledge some Supreme Court decisions because they were not in accords with the intent of the founding fathers. (From Bob Russell's message "*America's Spiritual Heritage*")

"You cannot deny that Christ set values of right and wrong, good and evil, as proclaimed in the bible was the driving force in the freedoms we have enjoyed in the United States today. Freedom for all races and religions to live together in peace."

Appreciating of Our Heritage



Our American History



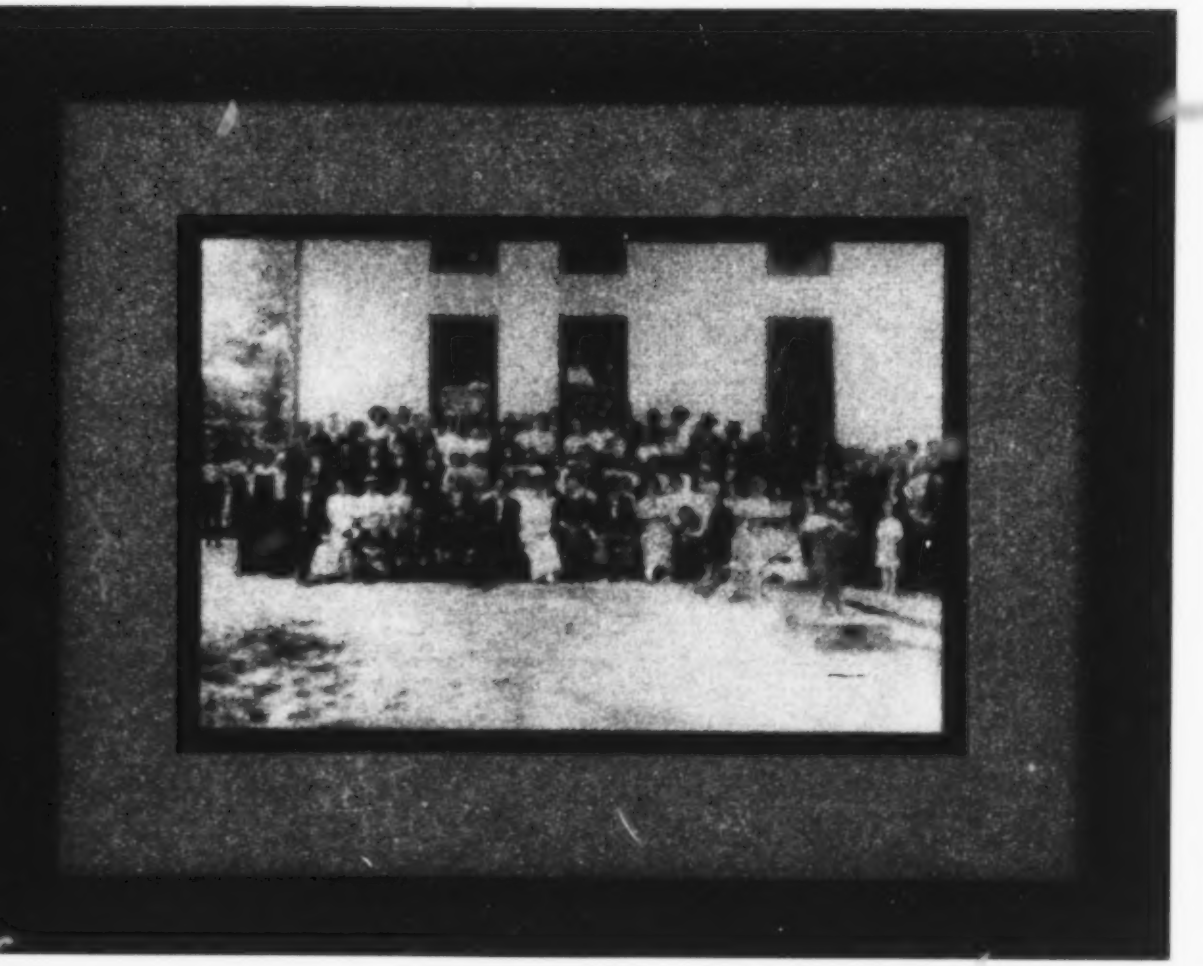
National Motto Plaque given to McCreary County
by Dr. and Mrs. Scotty Little on Veterans Day 2001

6

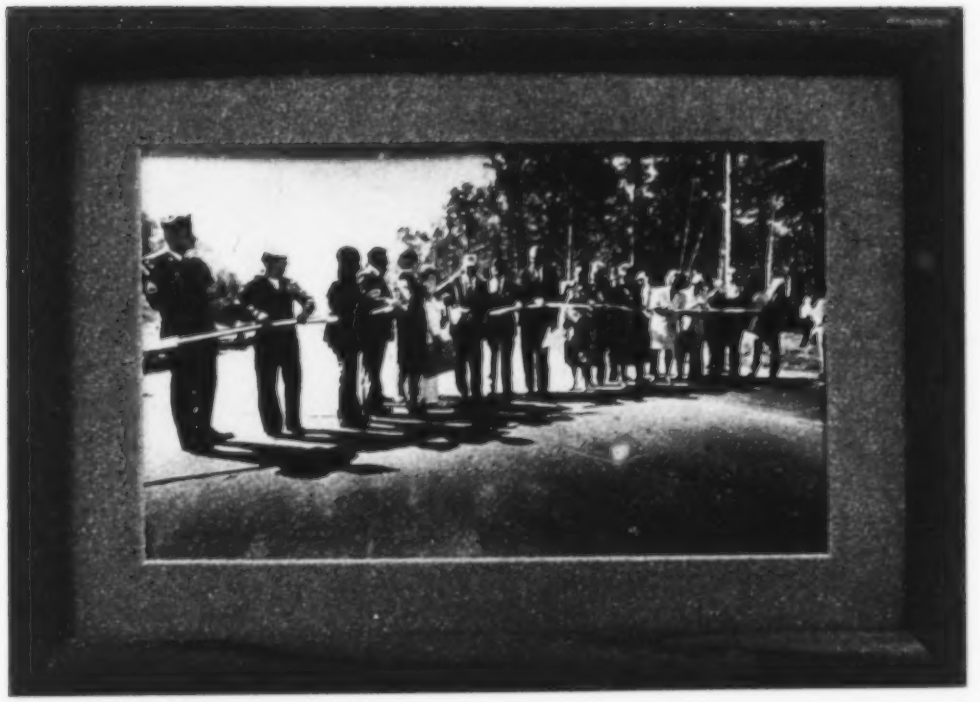
United States flag that flew over Bagram,
Afghanistan, on August 31, 2003.
Presented to McCreary County by
District Court Judge Daniel Ballou

7

Wilburn K. Ross a Medal of Honor winner
from Strunk, Kentucky in McCreary County



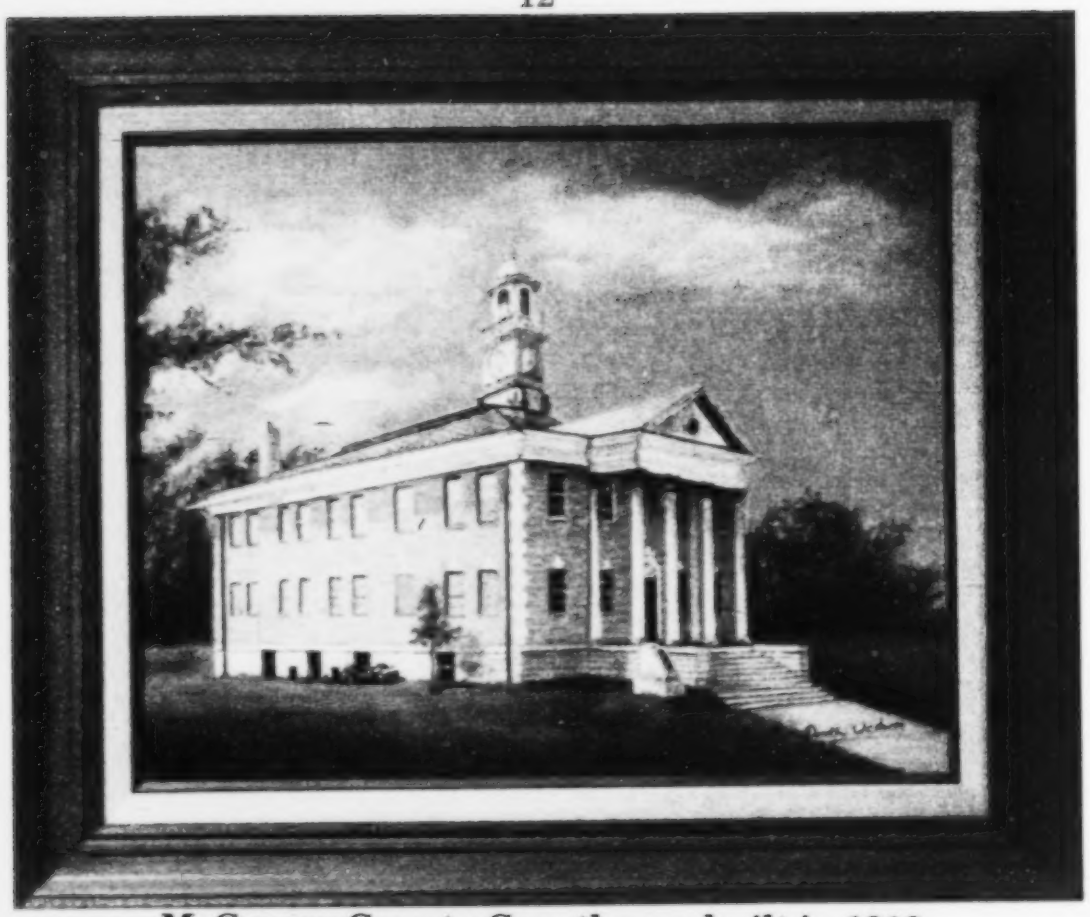
Members of McCreary County Courthouse staff



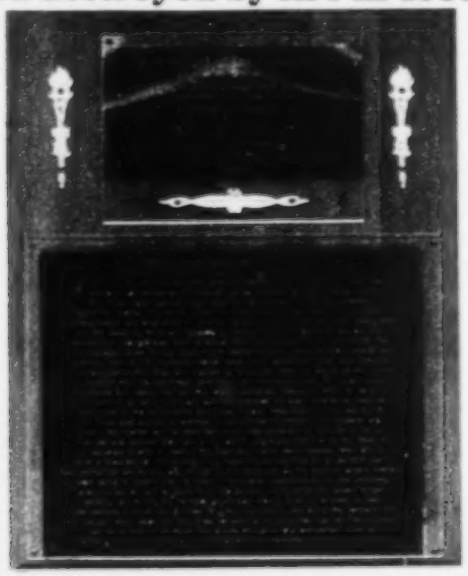
Ceremony showing naming of road after William K. Ross

Portrait of Governor James Bennett McCreary, 27th and 37th governor of Kentucky, completed in 1980

Plaque awarded to Elmer Boggs who was a McCreary County Extension Agent from 1956-1980

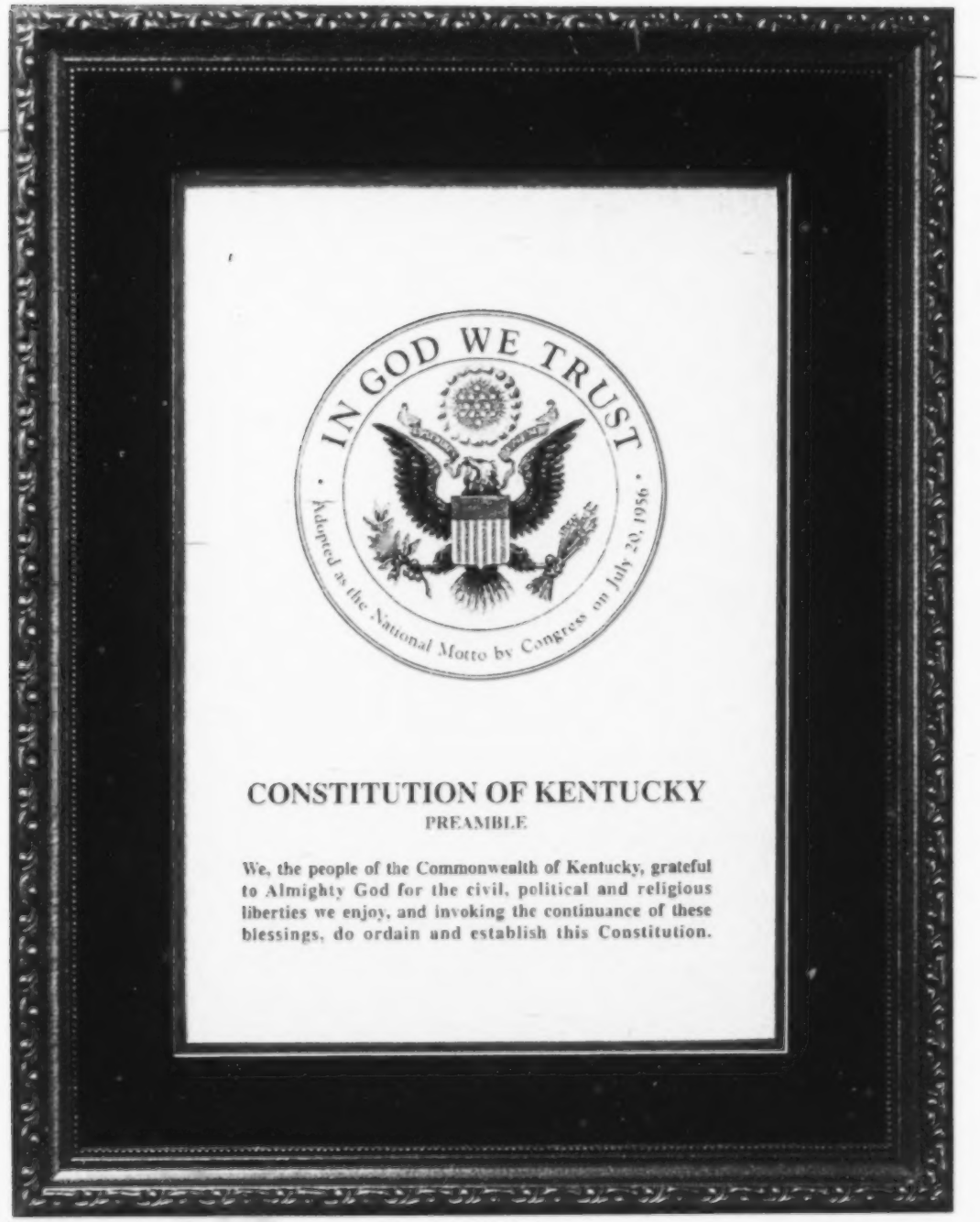


McCreary County Courthouse built in 1912 and destroyed by fire in 1930's

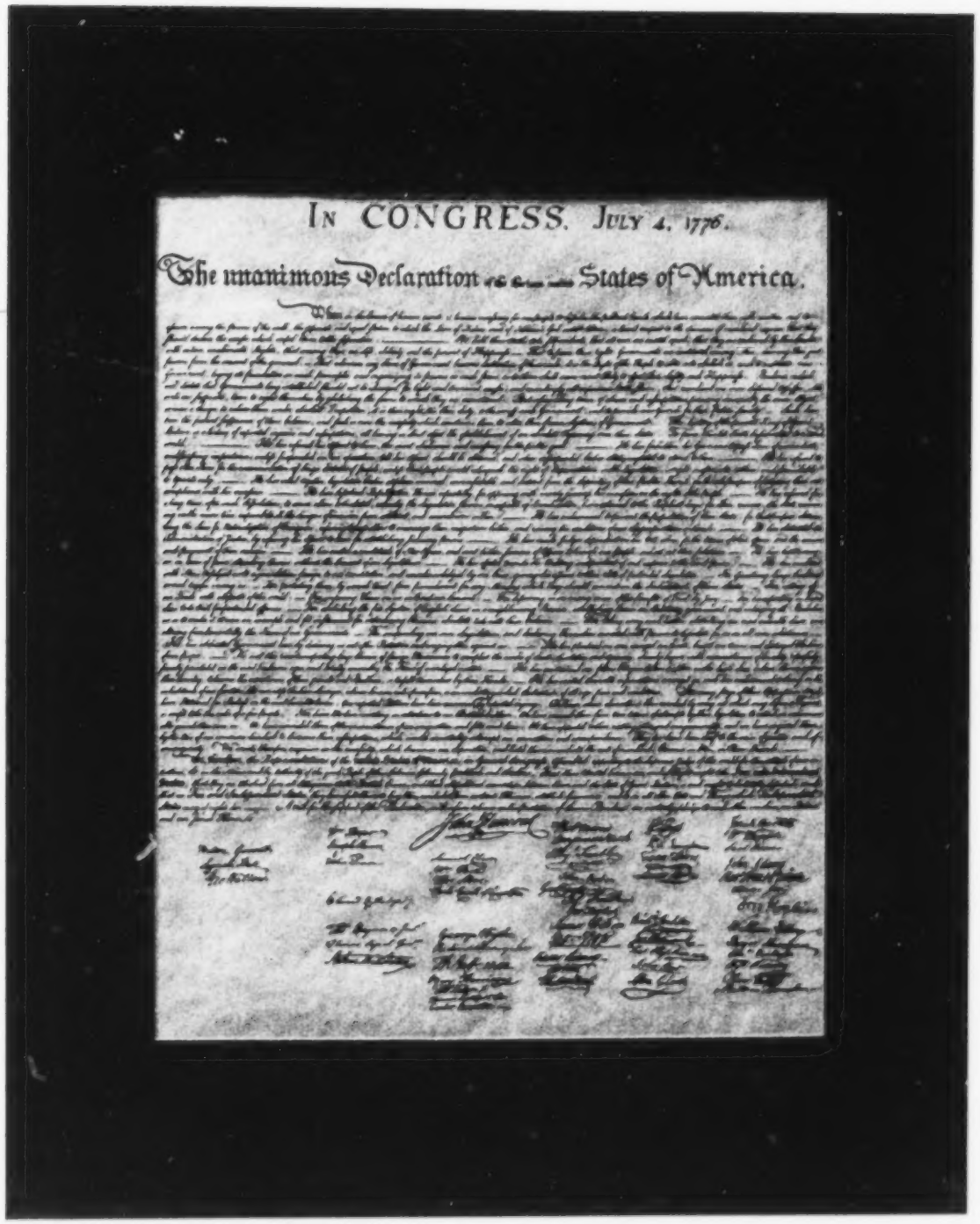


Citation given to Wilburn K. Ross

McCreary County Courthouse built in 1930's and destroyed by fire in late 1950's



Preamble to Kentucky Constitution



Declaration of Independence in a courtroom of McCreary County Courthouse

THE KENTUCKY SEVERE STORMS PREPAREDNESS PROGRAM

CERTIFICATE OF COMMENDATION

Issued to

McCreary County Emergency Management

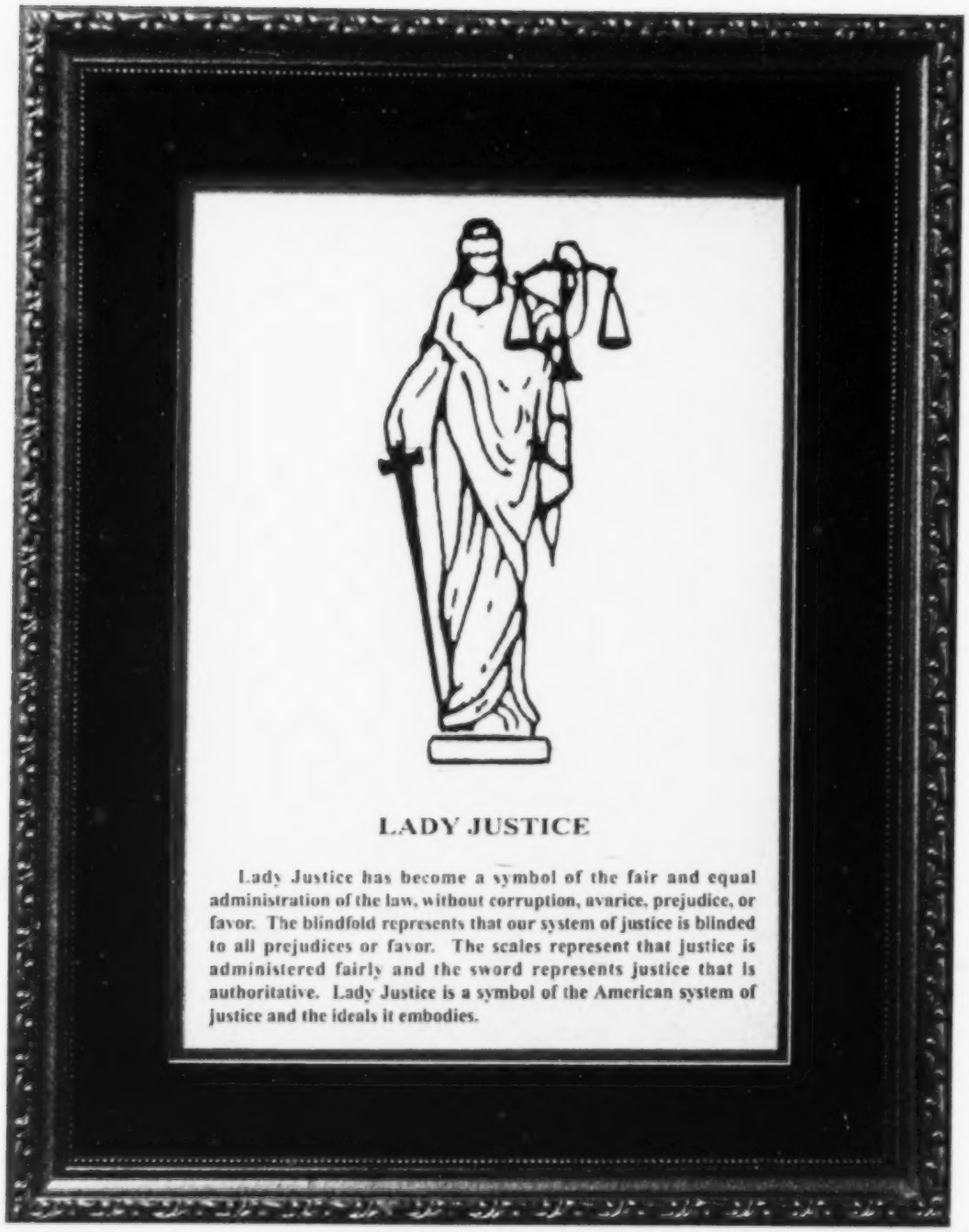
For participation in the

1999 Severe Storms Awareness Campaign.

Presented June 14, 1999

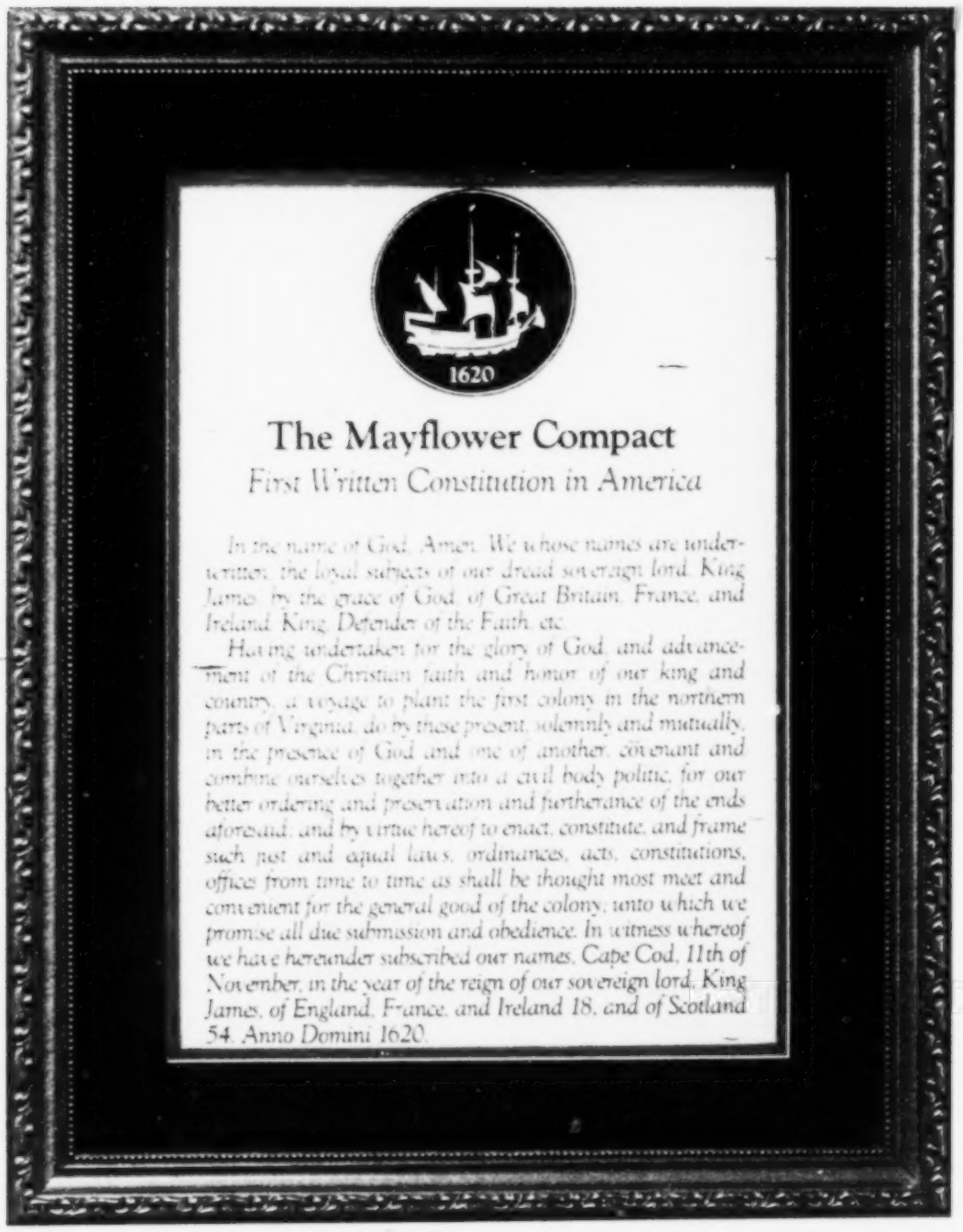
Severe Storms Preparedness Program
Committee Chair

Certificate of Commendation in a courtroom of McCreary County Courthouse

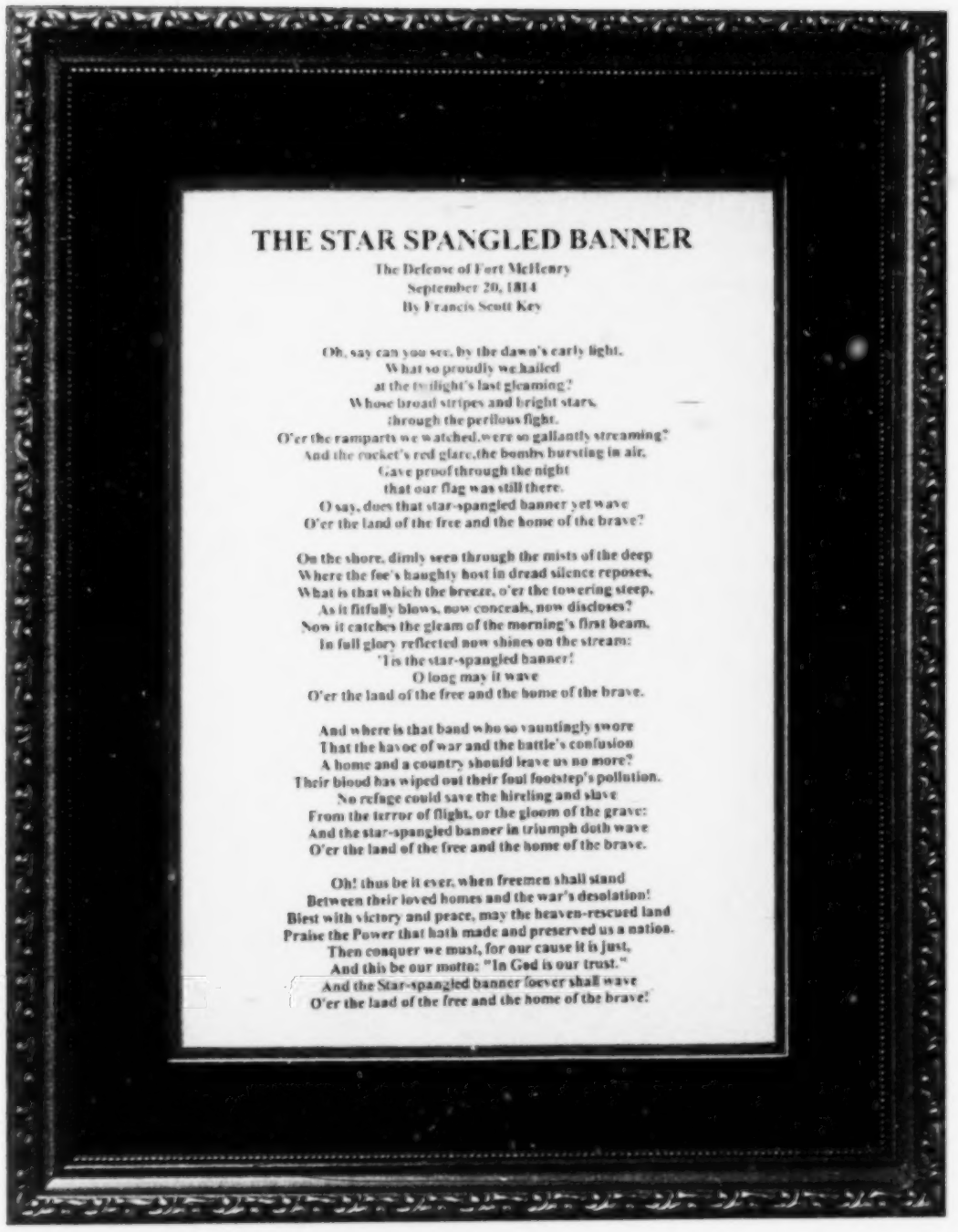

LADY JUSTICE

Lady Justice has become a symbol of the fair and equal administration of the law, without corruption, avarice, prejudice, or favor. The blindfold represents that our system of justice is blinded to all prejudices or favor. The scales represent that justice is administered fairly and the sword represents justice that is authoritative. Lady Justice is a symbol of the American system of justice and the ideals it embodies.

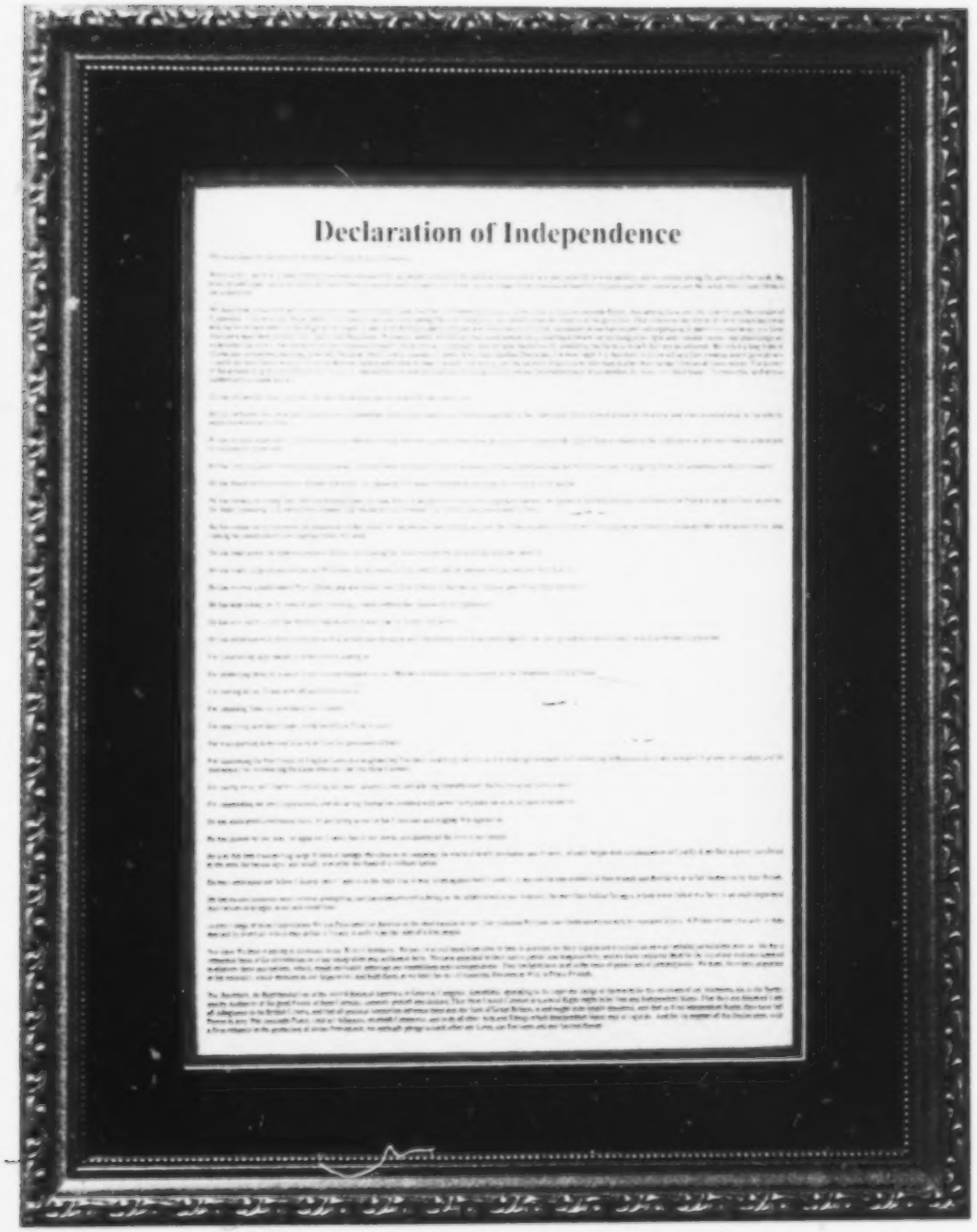
Lady Justice



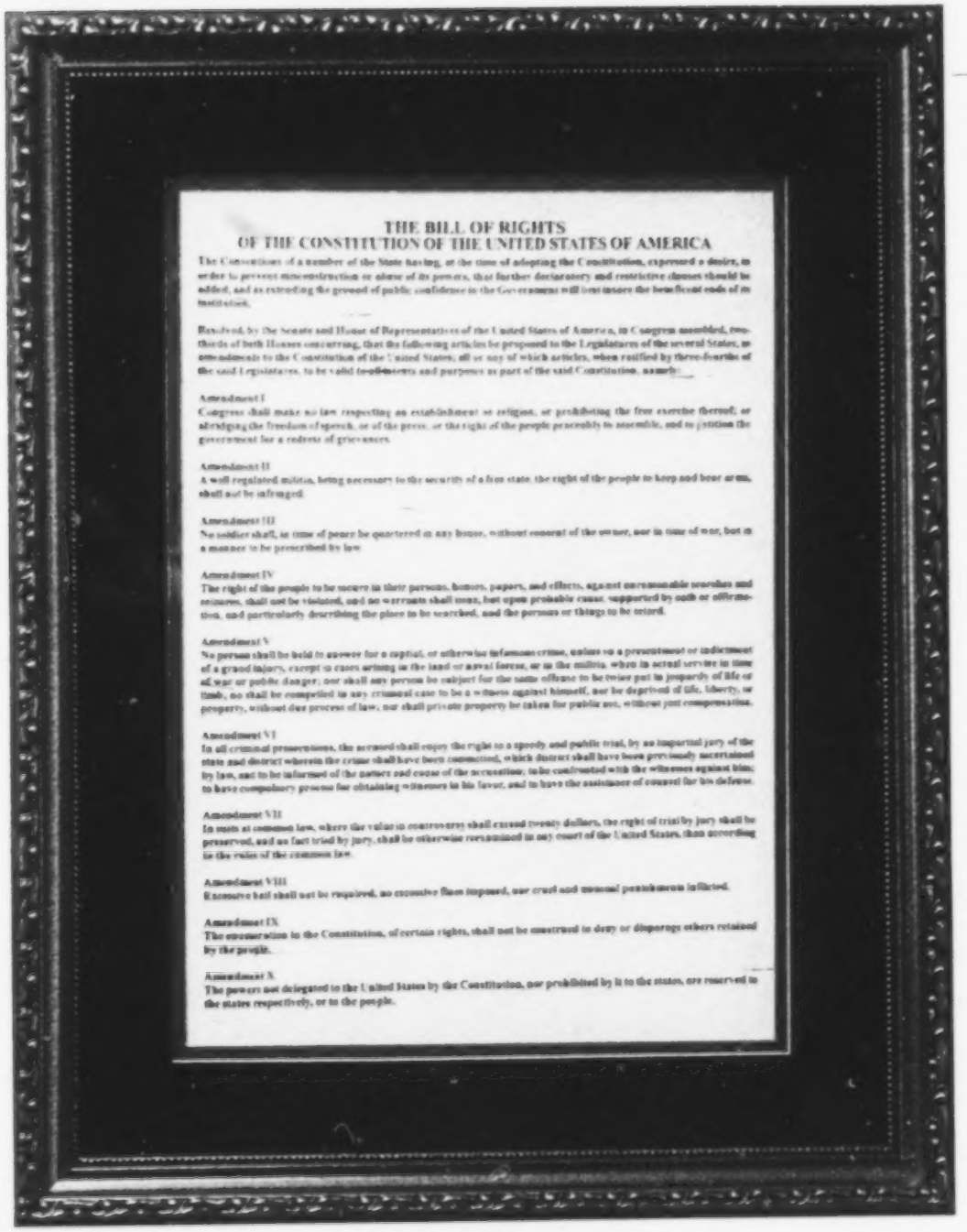
Mayflower Compact



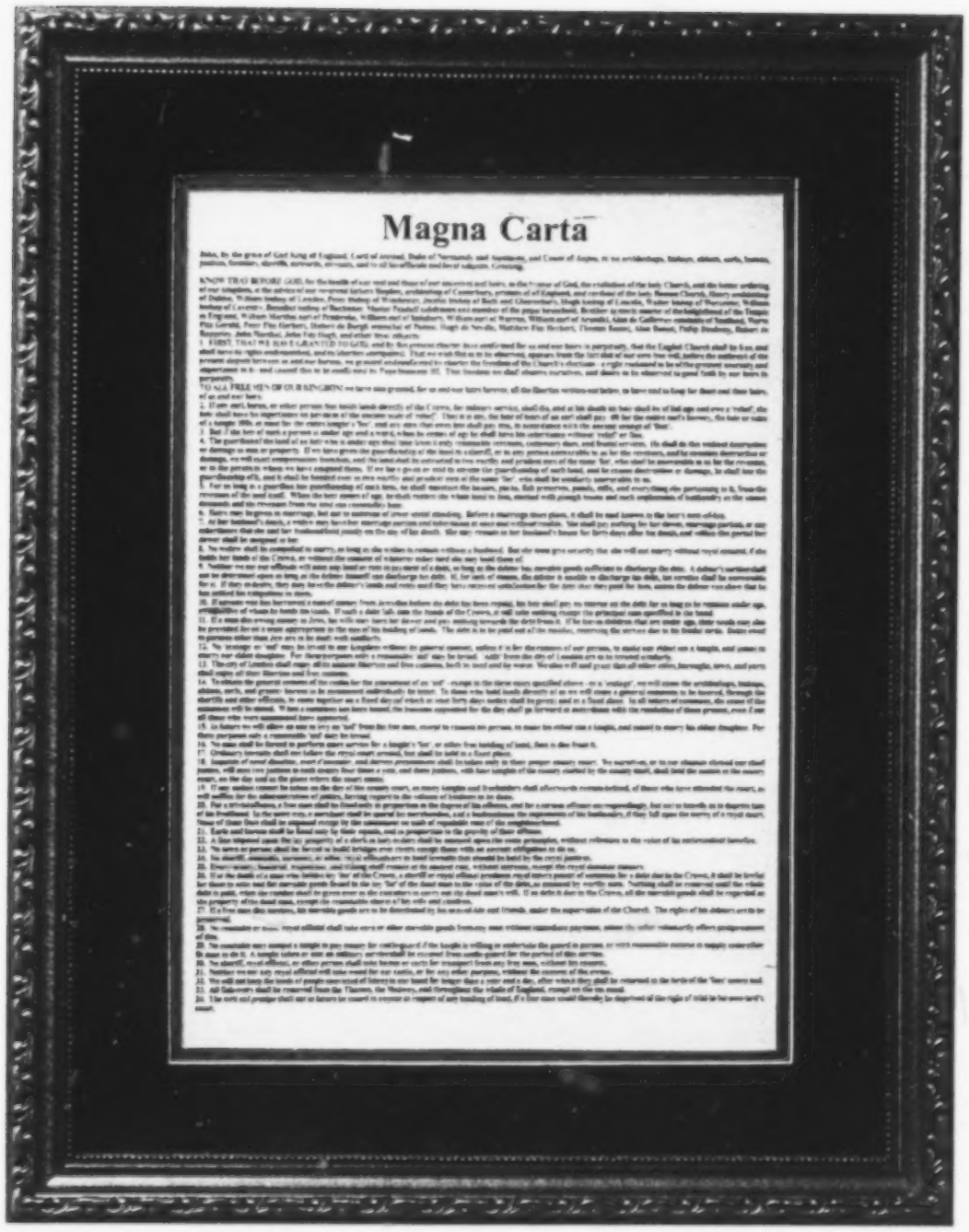
Star Spangled Banner



Declaration of Independence



Bill of Rights



Magna Carta

John, by the grace of God king of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, stewards, servants, and to all his officials and loyal subjects. Greeting.

KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of our reverend fathers Stephen, archbishop of Canterbury, primate of all England, and cardinal of the holy Roman Church, Henry archbishop of Dublin, William bishop of London, Peter bishop of Winchester, Jocelin bishop of Bath and Glastonbury, Hugh bishop of Lincoln, Walter bishop of Worcester, William bishop of Coventry, Benedict bishop of Rochester, Master Pandulf subdeacon and member of the papal household, Brother Aymeric master of the knighthood of the Temple in England, William Marshal earl of Pembroke, William earl of Salisbury, William earl of Warren, William earl of Arundel, Alan de Galloway constable of Scotland, Warin Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh seneschal of Poitou, Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip Daubeny, Robert de Roppeley, John Marshal, John Fitz Hugh, and other loyal subjects:

1. FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections – a right reckoned to be of the greatest necessity and importance to it – and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs forever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:

2. If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a 'relief', the heir shall have his inheritance on payment of the ancient scale of 'relief'. That is to say, the heir of a earl shall pay £100 for the entire earl's barony, the heir or ward of a knight £100, at most for the entire knight's 'fee', and any man that owes less shall pay less, in accordance with the ancient concept of 'fees'.

3. But if the heir of such a person is a minor and a ward, when he comes of age he shall have his inheritance without 'relief' or fine.

4. The guardian of the land of an heir who is a minor may plough only with reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property. If we have given the guardianship of the land to a sheriff, or to any person answerable to us for his revenues, and he causes destruction or damage, we will exact compensation from him, and the land shall be entrusted to two worthy and prudent men of the same 'fee', who shall be answerable to us for the revenues, or to the person to whom we have assigned them. If we have given or sold to anyone the guardianship of such land, and he causes destruction or damage, he shall lose the guardianship of it, and it shall be handed over to two worthy and prudent men of the same 'fee', who shall be similarly answerable to us.

5. For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with enough ploughs and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.

6. Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be made known to the heir's next-of-kin.

7. At her husband's death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband's house for forty days after his death, and within this period her dower shall be assigned to her.

8. No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold lands of.

9. Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt. If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be responsible for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his obligations to them.

10. If anyone who has borrowed a quantity of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands from. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.

11. If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it. If he has children that are under age, their needs may also be provided for on a scale appropriate to the size of his holding of lands. The debt is to be paid out of the residue, preserving the service due to his feudal lords. Debts owed to persons other than Jews are to be dealt with similarly.

12. No 'scutage' or 'aid' may be levied in our kingdom without its general consent, unless it is for the ransoming of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable 'aid' may be levied.

13. The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also wish and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.

14. To obtain the general consent of the realm for the assessment of an 'aid' – except in the three cases specified above – or a 'scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

15. In future we will allow no one to levy an 'aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable 'aid' may be levied.

16. No man shall be forced to perform more service for a knight's 'fee', or other free holding of land, than is due from it.

17. Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.

18. Inquests of novel disseisin, mort d'ancestor, and darrein presentment shall be taken only in their proper county court. We ourselves, or in our absence abroad our chief justice, will send two justices to each county four times a year, and these justices, with four knights of the county elected by the county itself, shall hold the assizes in the county court, on the day and in the place where the court assembles.

19. If any matters cannot be taken on the day of the county court, or many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the adequate taking of justice, having regard to the volume of business to be done.

20. For a misdemeanour, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not to the point of depriving him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

21. Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offences.

22. A fine imposed upon the lay property of a cleric in such matters shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice.

23. No town or person shall be forced to build bridges over rivers except those with an ancient obligation to do so.

24. No sheriff, constable, coroners, or other royal officials are to hold pleas that should be held by the royal justices.

25. Every county, hundred, wapentake, and trithing shall remain at the ancient rent, without increase, except the royal demesne manors.

26. If at the death of a man who holds land of the Crown, a sheriff or royal official produces royal letters patent of summons for a debt due to the Crown, it shall be lawful for them to seize and list movable goods found in the city 'fee' of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man's will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.

27. If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his sureties are to be preserved.

28. No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of time.

29. No constable may compel a knight to pay money for castle-guard if the knight is willing to undertake the guard in person, or with reasonable excuse to supply some other to do so. A knight taken or sent on military service shall be excused from castle-guard for the period of this service.

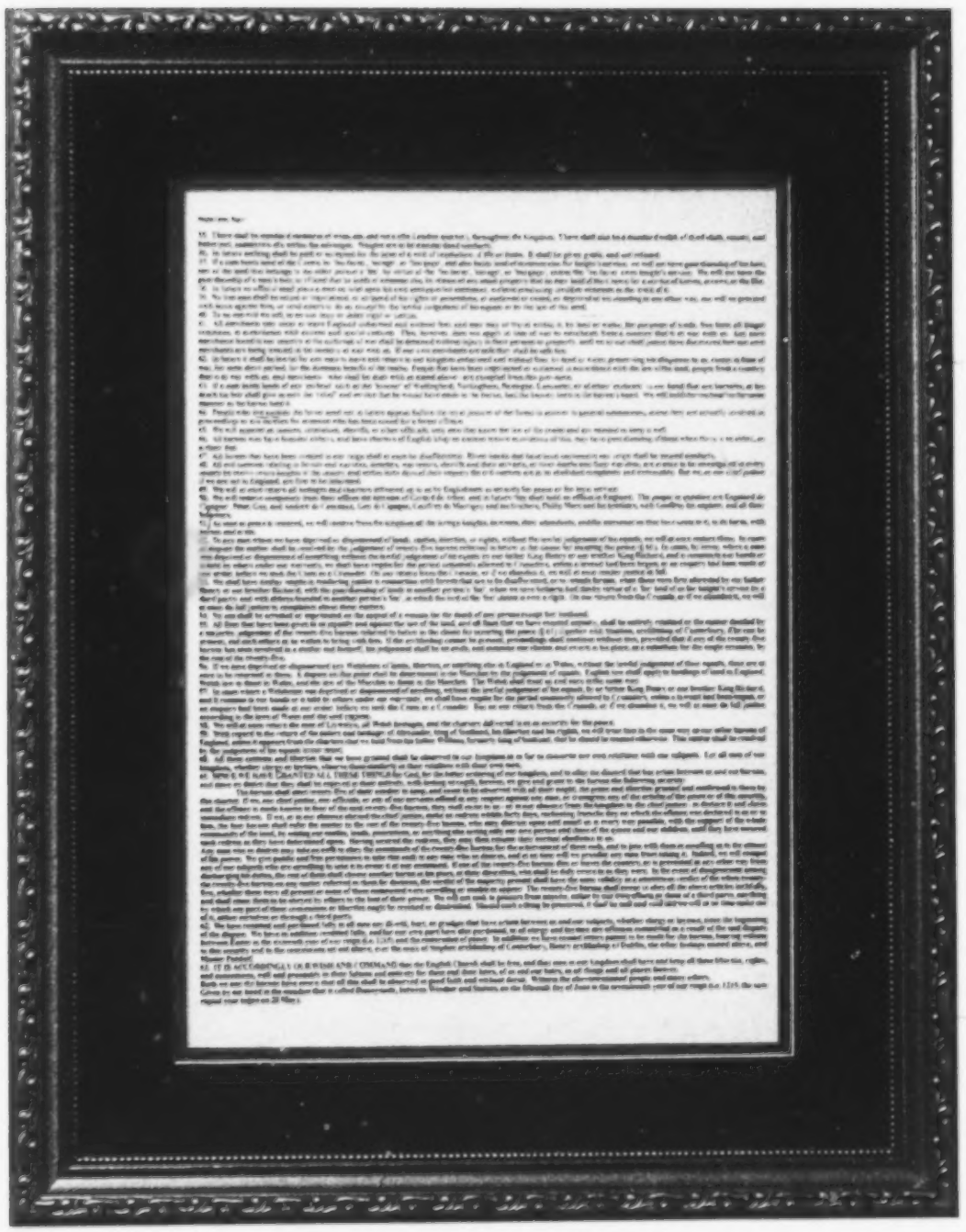
30. No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.

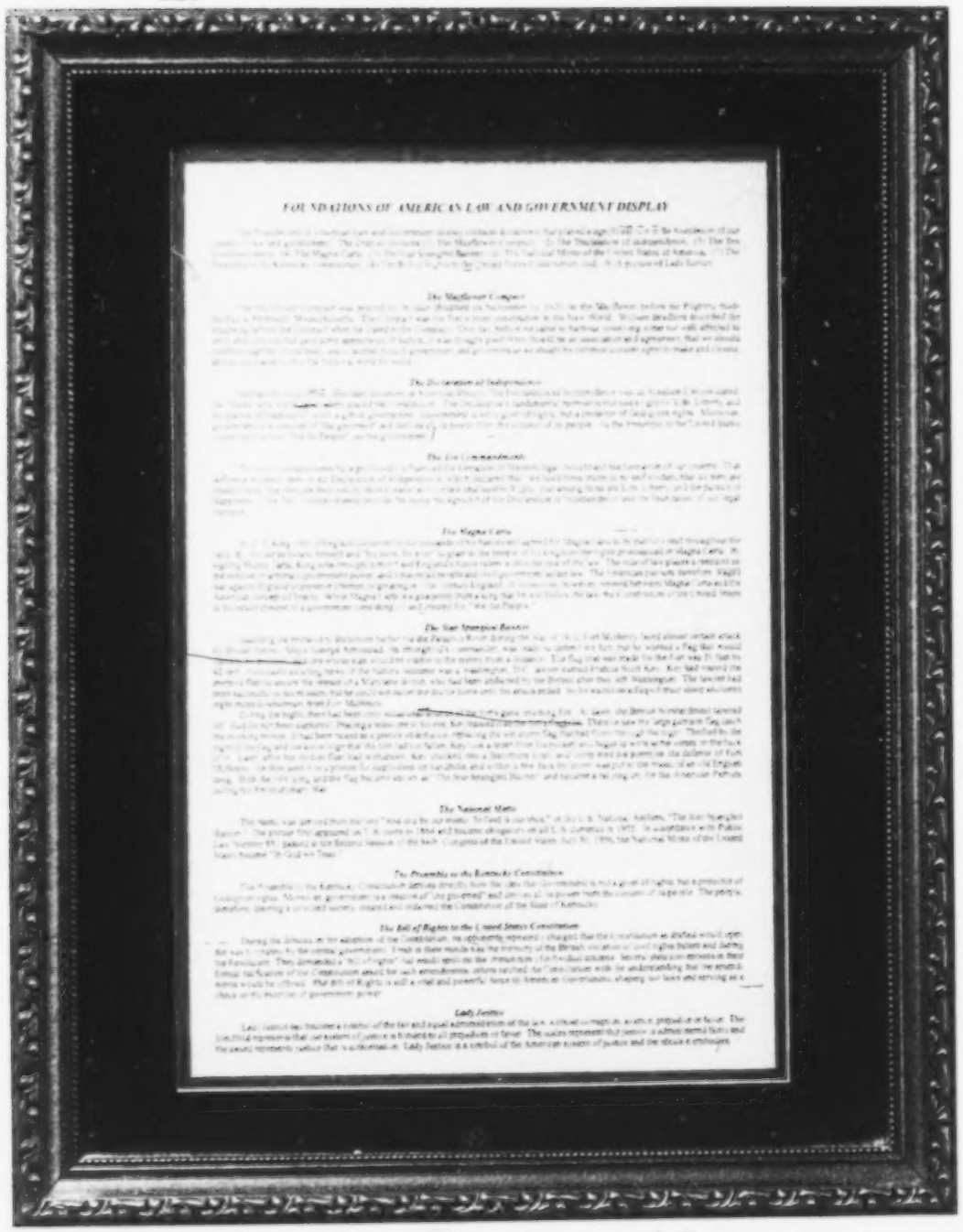
31. Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.

32. We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the 'fees' concerned.

33. All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.

34. The writ called *praecipe* shall not in future be issued so as to deprive any freeman of the right of trial in his own lord's court.



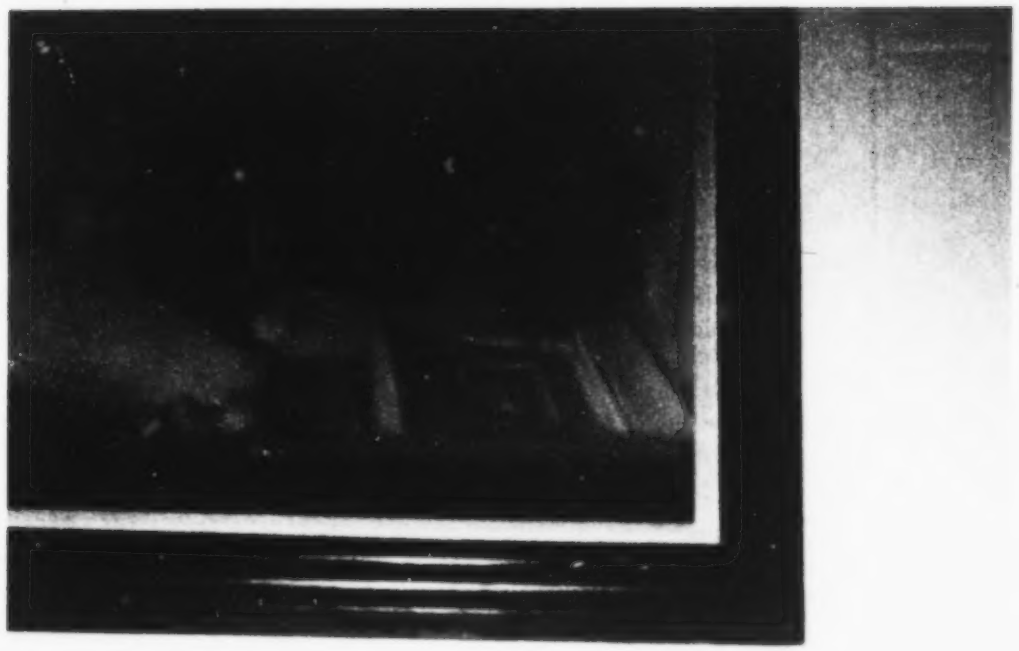


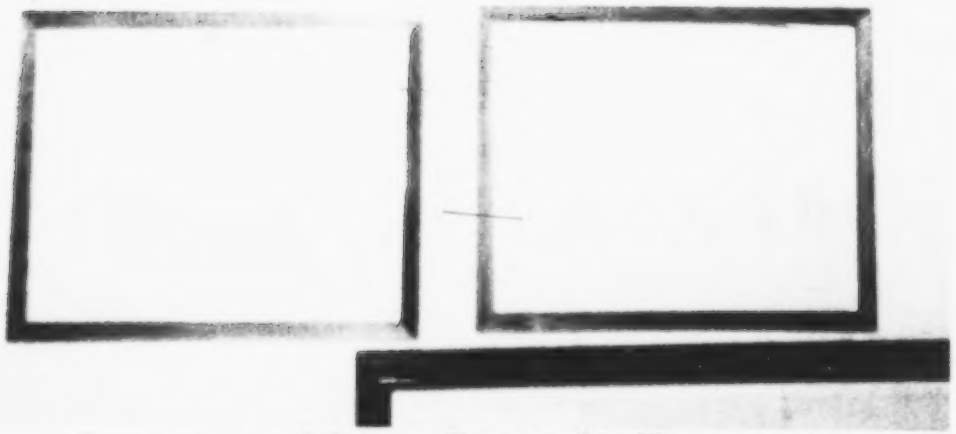
Foundation of American Law and Government

Judge Jimmie Greene With Historical Documents

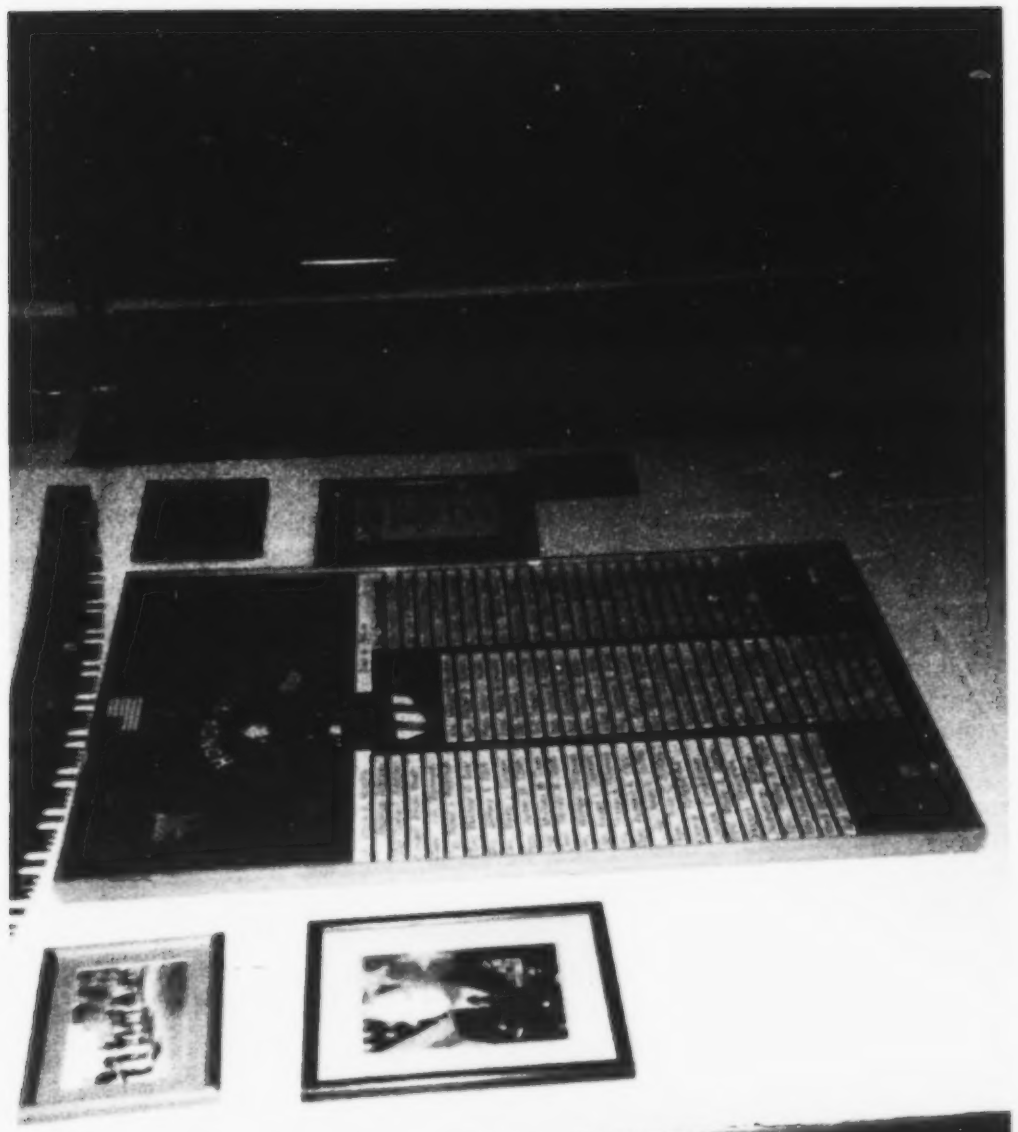
Judge Jimmie Greene With Historical Documents

President Roosevelt Signing
Social Security Documents





Germany and Japan Surrender Documents and Civil War Veteran



Desert Storm Honor Roll and Other Historical Documents

CONCLUSION

Amici curiae respectfully requests this Court to reverse the Sixth Circuit's decision in *ACLU v. McCreary County*.

Respectfully submitted,

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December 8, 2004

PULASKI COUNTY COURTHOUSE

App. 1

Casimir Pulaski (1747-1779) and Nicholas Jasper, founders of Pulaski County

App. 2

Pulaski County Courthouses, Past and Present. First Courthouse built in 1801; Second Courthouse built in 1874; Third Courthouse built in 1975

App. 3

Plaque commemorating Civil War battles of Mill Springs and Battle of Dutton's Hill in Pulaski County

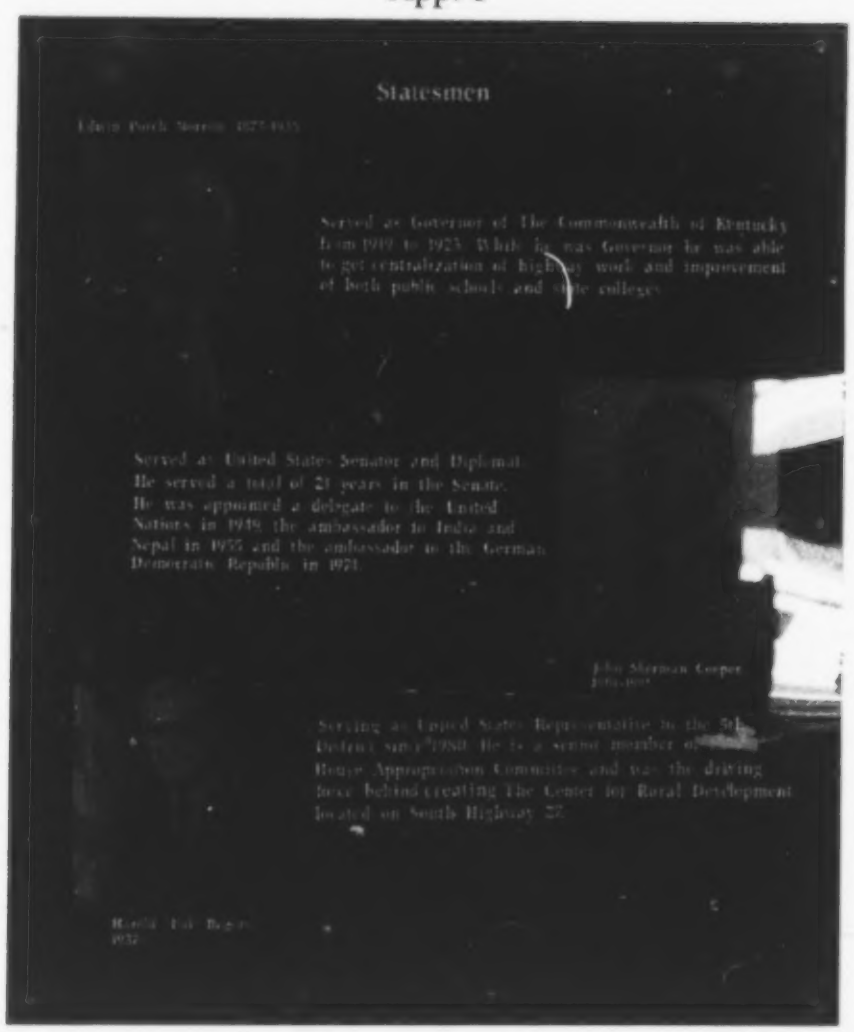
App. 4

Plaque showing early modes of travel

App. 5

Pulaski County artists: Harriet Louise Simpson Arnow (1908-1986), author of "Dollmaker"; Edith Pearl Fitzgerald (1897-1968), playwright who wrote "Chicago"; Todd Duncan (1903-1998), actor in "Porgy and Bess"

App. 6

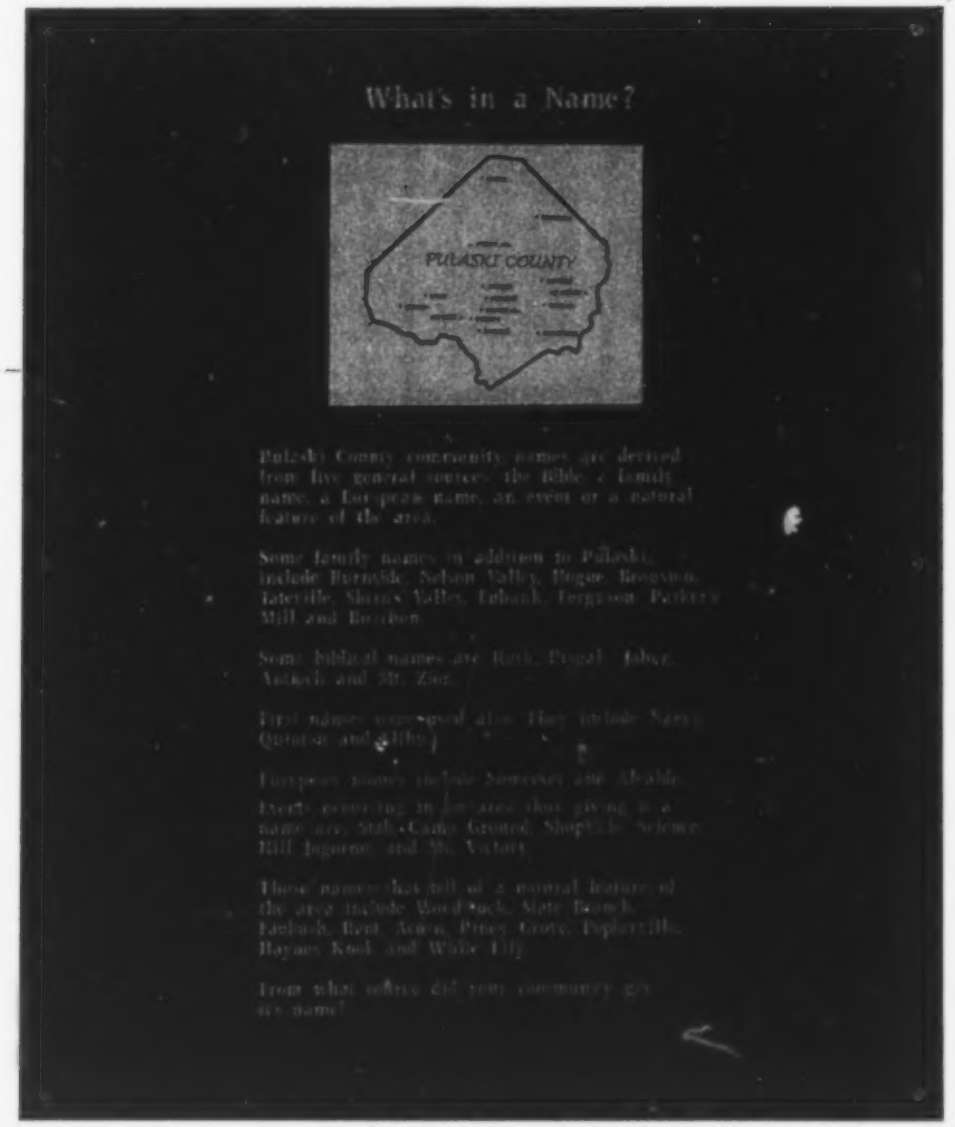


Statesmen of Pulaski County: Edwin Porch Murrey (1877-1935), Governor of Kentucky from 1919-1923; John Sherman Cooper (1901-1991), United States Senator; Harold "Hal" Rogers (1937-___), United States House of Representatives

App. 7

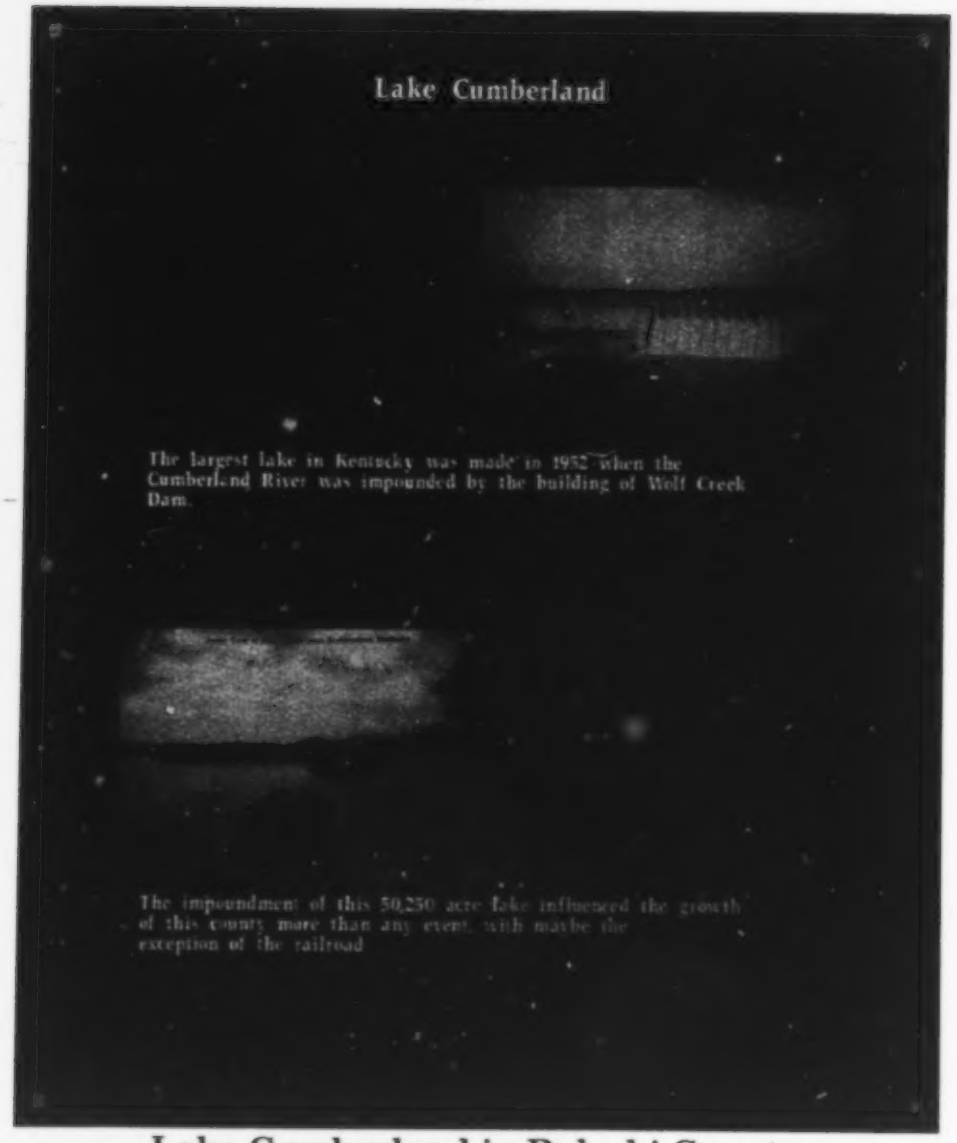
Sergeant Brent Woods, Medal of Honor

App. 8



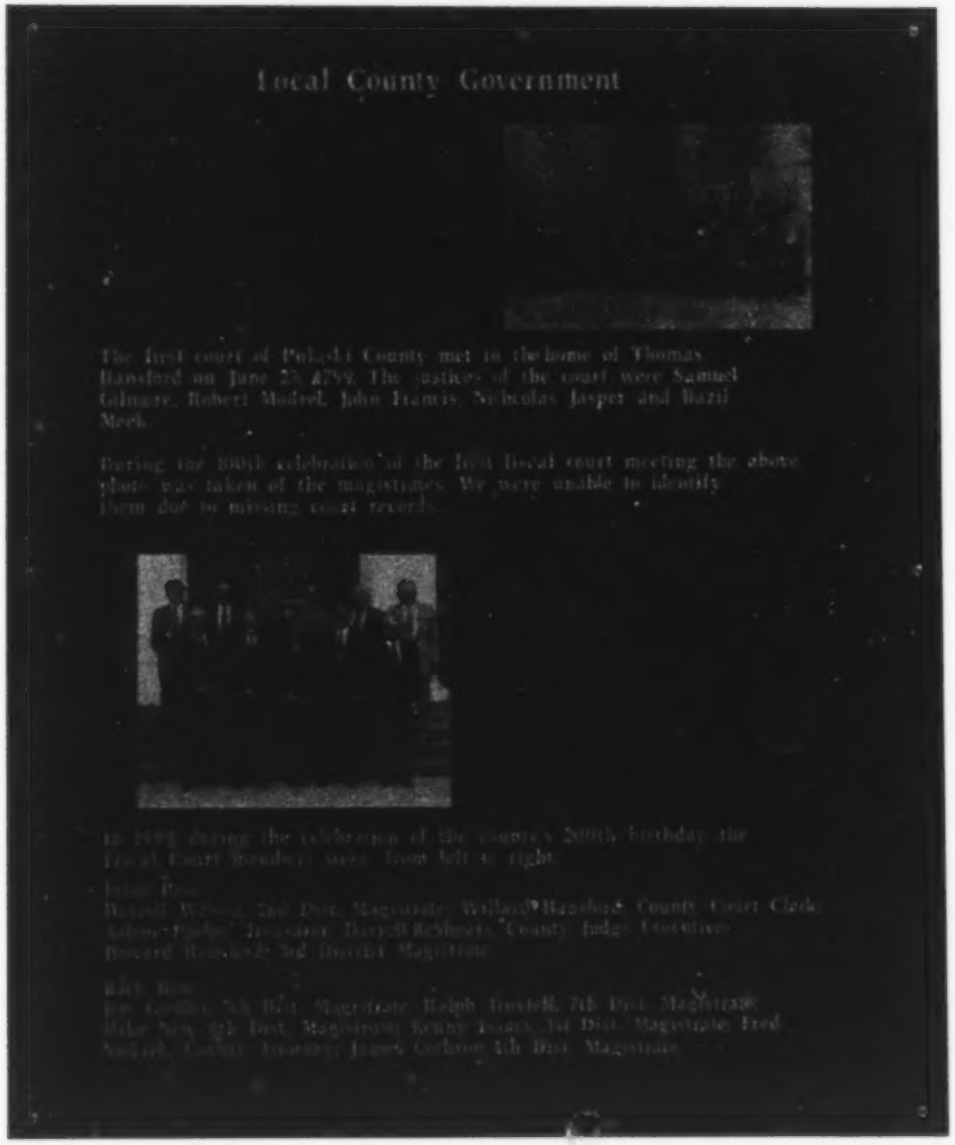
What is in a Name?

App. 9



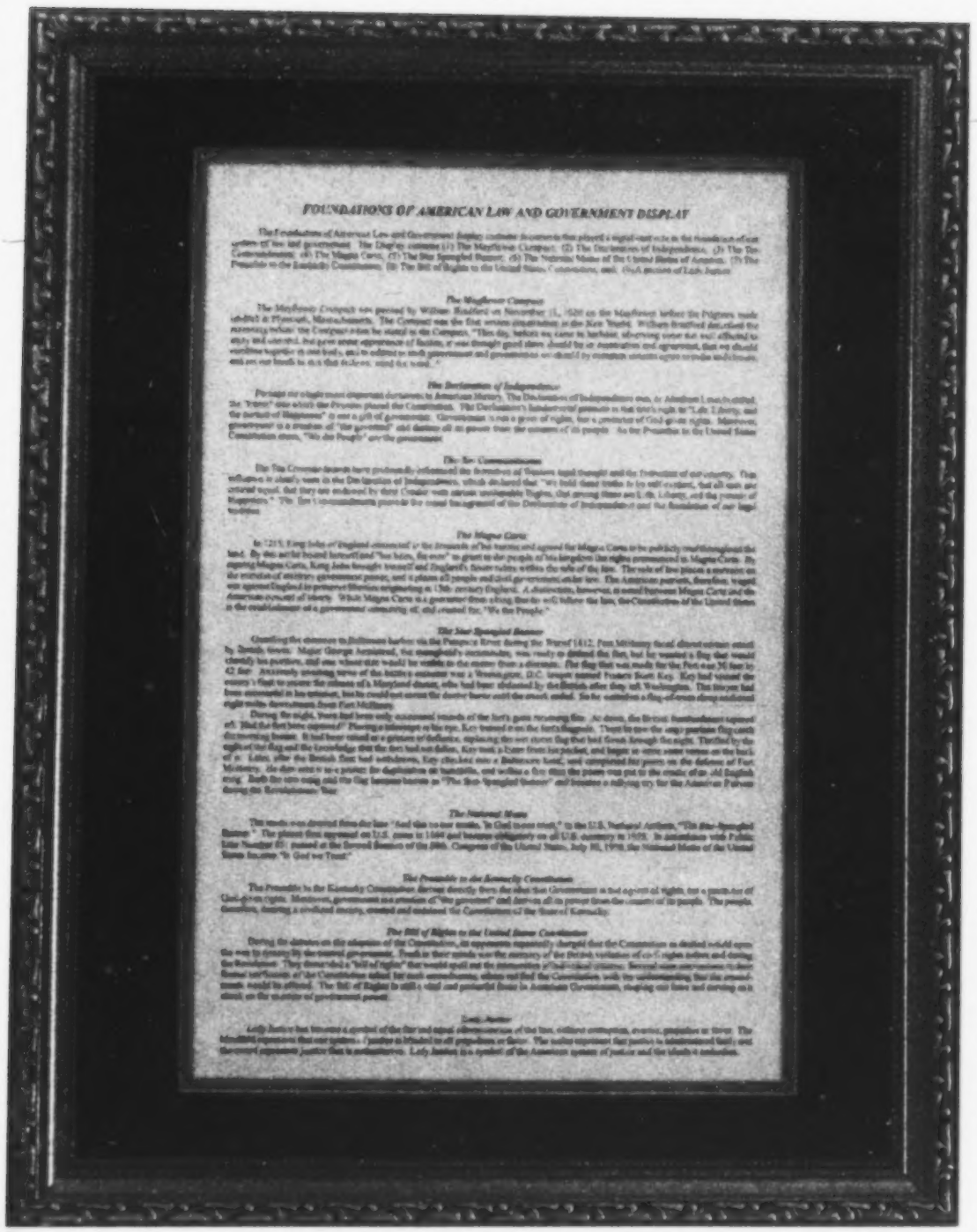
Lake Cumberland in Pulaski County

App. 10



Local County Government

App. 11



FOUNDATIONS OF AMERICAN LAW AND GOVERNMENT DISPLAY

The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government. The display contains (1) The Mayflower Compact; (2) The Declaration of Independence; (3) The Ten Commandments; (4) The Magna Carta; (5) The Star Spangled Banner; (6) The Northwest Ordinance of the United States of America; (7) The Preamble to the Kentucky Constitution; (8) The Bill of Rights to the United States Constitution; and, (9) A statute of Lady Justice.

The Mayflower Compact

The Mayflower Compact was penned by William Bradford on November 11, 1620 as the Mayflower harbor for Pilgrims made landfall in Provincetown, Massachusetts. The Compact was the first written constitution in the New World. William Bradford described the necessity behind the Compact when he stated in the Compact, "This day, before we came to harbor, observing some not well affected to unity and concord, but gave some appearance of faction, it was thought good there should be an association and agreement, that we should combine together in one body, and to submit to such government and governors as we should by common consent agree to make and choose, and set over us both to rule and govern, and for more.."

The Declaration of Independence

Perhaps the single most important document in American History. The Declaration of Independence was, as Abraham Lincoln stated, the "Fount" that which the Framers placed the Constitution. The Declaration's fundamental premise is that man's right to "Life, Liberty, and the pursuit of Happiness" is not a gift of government. Government is not a grant of rights, but a protector of God-given rights. Moreover, government is a creation of "the governed" and derives all its power from the consent of its people. So the Preamble to the United States Constitution states, "We the People" are the government.

The Ten Commandments

The Ten Commandments have profoundly influenced the formation of Western legal thought and the Federalism of our country. This influence is clearly seen in the Declaration of Independence, which declared that "we hold these truths to be self-evident, that all men are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal traditions.

The Magna Carta

In 1215, King John of England consented to the demands of his barons and agreed the Magna Carta, to be publicly read throughout the land. By this act he bound himself and "his heirs, forever" to grant to the people of his kingdom the rights pronounced in Magna Carta. By signing Magna Carta, King John brought himself and England's future rulers within the rule of the law. The rule of law places a restraint on the exercise of arbitrary governmental power, and it places all people and civil government under law. The American patriots, therefore, waged war against England to preserve liberties originating in 13th century England. A distinction, however, is noted between Magna Carta and the American concept of liberty. While Magna Carta is a guarantee from a King that he will follow the law, the Constitution of the United States is the establishment of a government consisting of, and created for, "We the People."

The Star Spangled Banner

Guarding the entrance to Baltimore harbor via the Patapsco River during the War of 1812, Fort McHenry faced distant retreat attack by British forces. Major George Armistead, the stouthearted commander, was ready to defend the fort, but he wanted a flag that would clearly let everyone, and one whom that would be visible to the enemy from a distance. The flag that was made for the Fort was 30 feet by 42 feet. Awakened morning survey of the battle's outcome was a "broken glory." Washington, D.C. lawyer named Francis Scott Key. Key had viewed the enemy's fight to secure the release of a Maryland citizen, who had been abducted by the British after they left Washington. This lawyer had been successful in his mission, but he could not assist the doctor better until the attack ended. So he watched a flag of seven strong and proud eight miles downstream from Fort McHenry.

During the night, Yours had been only occasional sounds of the fort's guns screaming fire. At dawn, the British bombardment ceased and "Had the fort been captured?" Peering a telescope to his eye, Key trained it on the fort's flagpole. There he saw the large garrison flag catch the morning breeze. It had been raised as a gesture of defiance, replacing the war storm flag that had flown through the night. Thrilled by the sight of the flag and the knowledge that the fort had not fallen, Key took a letter from his pocket, and began to write some verses on the back of it. Later, after the British fleet had withdrawn, Key checked into a Baltimore hotel, and completed his poem on the defense of Fort McHenry. He then sent it to a printer for duplication as handbills, and within a few days the poem was put to the music of an old English song. Both the verse song and the flag became known as "The Star-Spangled Banner" and became a rallying cry for the American Patriots during the Revolutionary War.

The National Motto

The words were derived from the line "And this we our motto, 'In God is our trust,'" in the U.S. National Anthem, "The Star-Spangled Banner." The phrase first appeared on U.S. coins in 1864 and became obligatory on all U.S. currency in 1938. In accordance with Public Law Number 85 - passed at the Second Session of the 84th Congress of the United States, July 30, 1956, the National Motto of the United States became "In God we Trust."

The Preamble to the Kentucky Constitution

The Preamble to the Kentucky Constitution declares directly there that what that Government is not a grant of rights, but a protector of God-given rights. Moreover, government as a creation of "the governed" and derives all its power from the consent of its people. The people, therefore, desiring a civilized society, created and ordained the Constitution of the State of Kentucky.

The Bill of Rights to the United States Constitution

During the debates on the adoption of the Constitution, its opponents repeatedly charged that the Constitution as drafted would open the way to tyranny by the federal government. Fresh in their minds was the memory of the British violation of civil rights before and during the Revolution. They demanded a "bill of rights" that would spell out the immunities of individual citizens. Several state conventions in their formal ratification of the Constitution called for such amendments, others ratified the Constitution with the understanding that this amendments would be offered. The Bill of Rights is still a vital and profanified force in American Government, shaping our laws and serving as a check on the exercise of government power.

Lady Justice

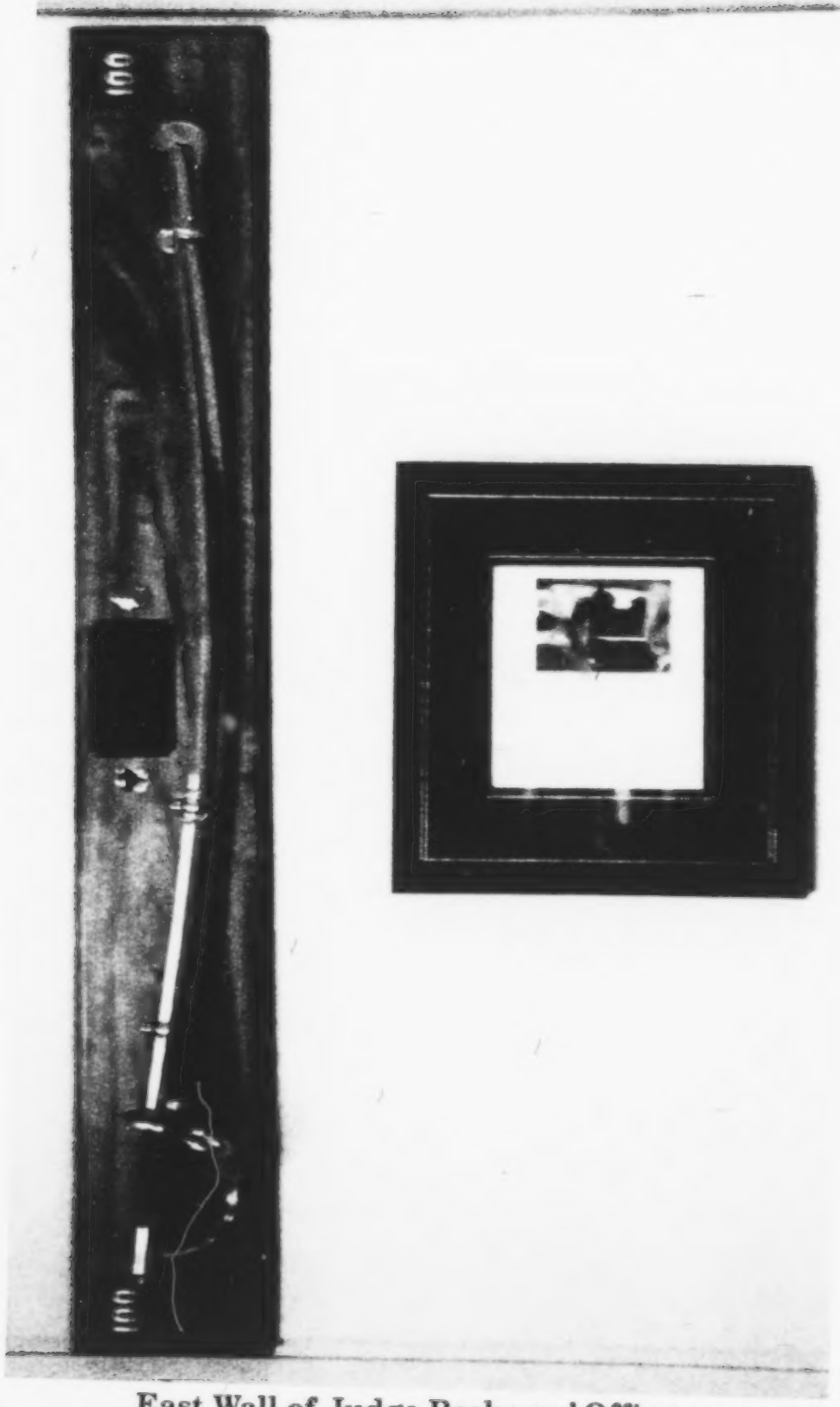
Lady Justice has become a symbol of the fair and equal administration of the law, without corruption, evasion, prejudice or favor. The blindfold represents that our system of justice is blinded to all prejudices or favor. The scales represent that justice is administered fairly, and the sword represents justice that is authoritative. Lady Justice is a symbol of the American system of justice and the ideals it embodies.

Foundations of American Law

App. 12

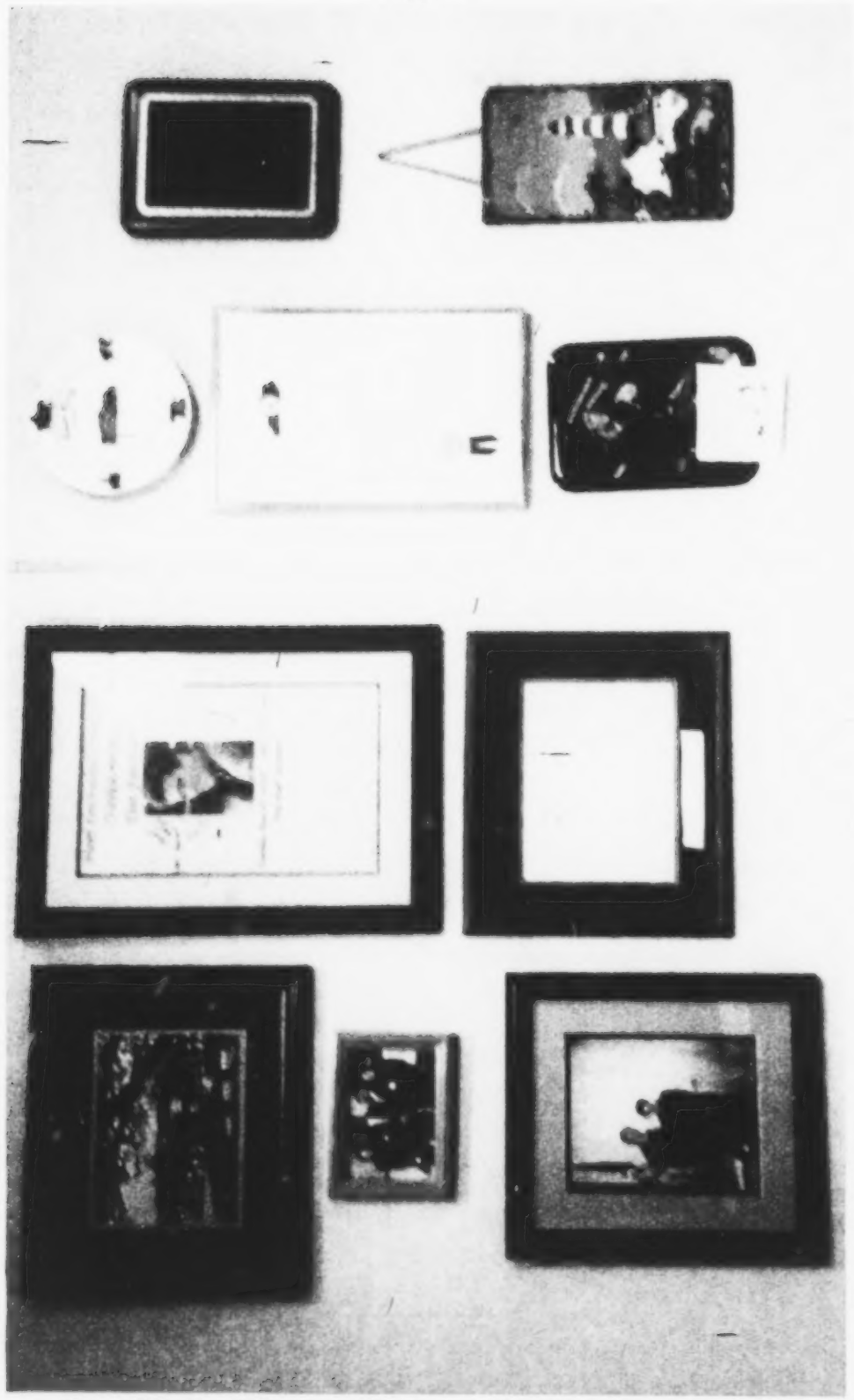
West Wall of Judge Beshears' Office containing various historical documents

App. 13



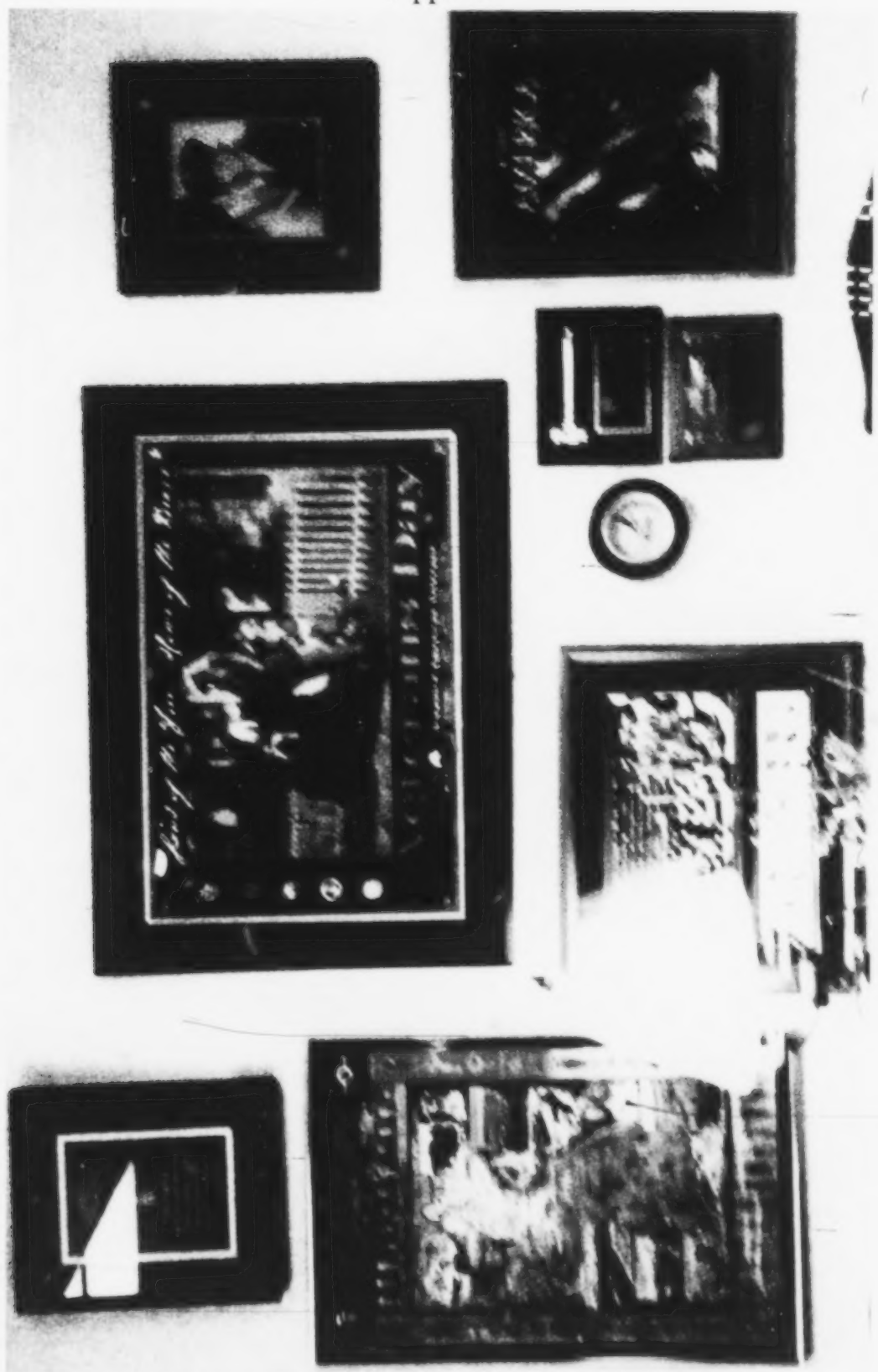
East Wall of Judge Beshears' Office

App. 14



East Wall of Judge Beshears' Office Continued

App. 15



Military Wall in Judge Beshears' office

App. 16

9/11 Picture by Fred Thrasher in Fiscal Courtroom

App. 17

Map of Kentucky in Fiscal Courtroom

App. 18

Eagle in Fiscal Courtroom

App. 19

Flag Honoring Firefighters in Fiscal Courtroom

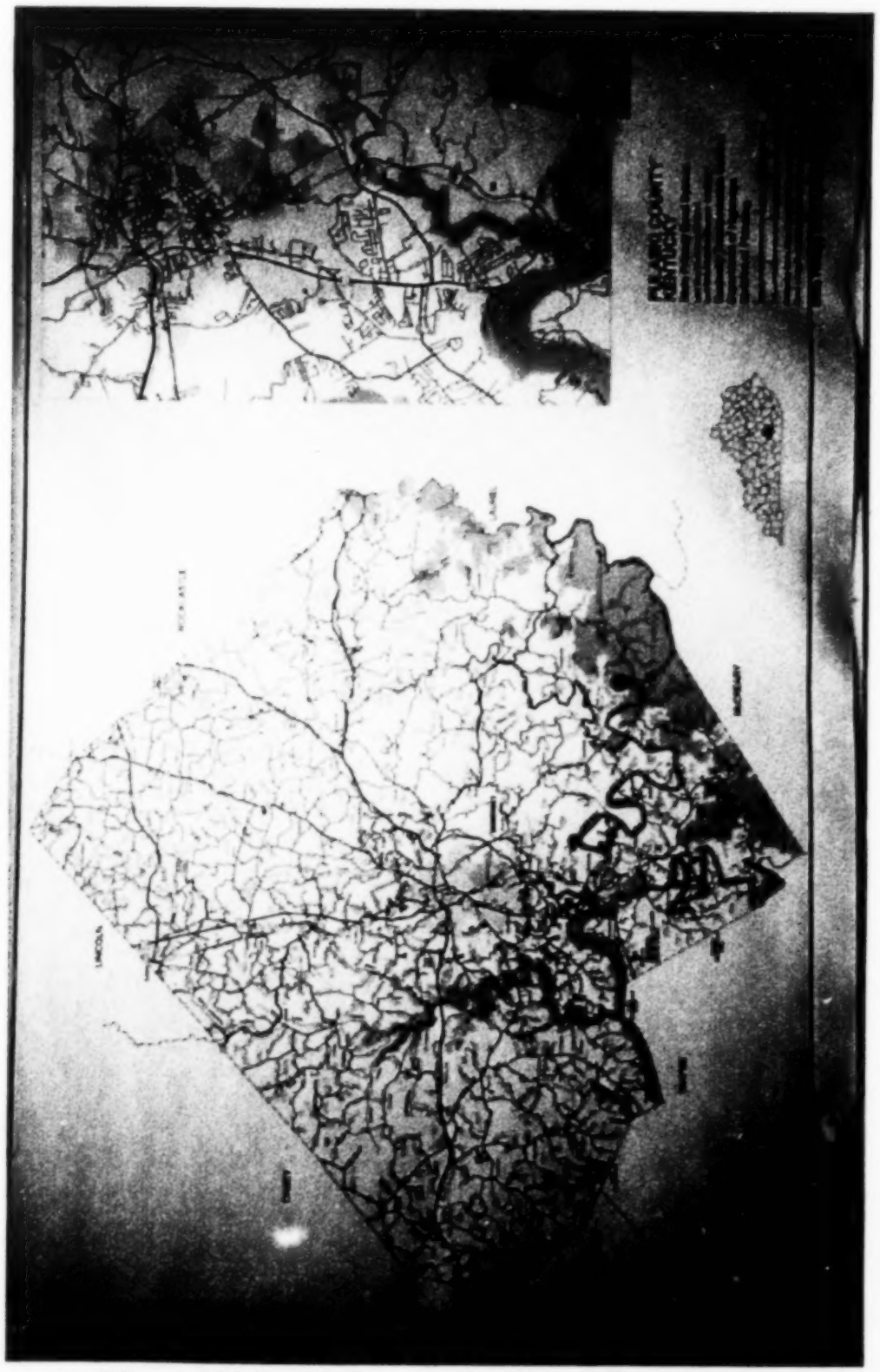
App. 20

Judges of Pulaski County in Fiscal Courtroom

App. 21

Judges of Pulaski County in Fiscal Courtroom

App. 22



Map of Pulaski County in Fiscal Courtroom

(35)

No. 03-1693

IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND THE NATIONAL COUNCIL OF JEWISH WOMEN, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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January 21, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to defending religious liberty and the separation of church and state. Since its founding in 1947, Americans United has regularly been involved as a party, as counsel, or as an *amicus curiae* in leading church-state cases before this Court and other federal and state courts. Americans United has long experience litigating challenges to government displays of religion and, indeed, is currently serving as counsel to the plaintiffs in several cases in the lower federal courts that challenge government-sponsored displays of the Ten Commandments. As an organization frequently involved in such litigation, as well as in other categories of cases brought under the Establishment Clause, Americans United believes that it can offer the Court special insight into the constitutional issues raised by this case.

People For the American Way Foundation ("PFAWF") is a non-profit, non-partisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 600,000 members and activists nationwide. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend religious liberty and the separation of church and state. PFAWF has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the principles that

---

[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

government officials must remain neutral toward religion, that they cannot act for the purpose of advancing religion, and that government displays that endorse religion trample on religious freedom and violate the separation of church and state.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members, supporters, and volunteers in over 500 communities nationwide. NCJW joins this brief, which is consistent with NCJW's National Principle that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society."

INTRODUCTION AND SUMMARY OF ARGUMENT

The displays of the Ten Commandments posted by the petitioner Kentucky counties in their courthouses violate the Establishment Clause because, regardless of their effect, the displays are animated by an improper purpose to advance or endorse a particular religion or religious belief. The record shows that the actual purpose of the government actors was nothing more or less than to display the Ten Commandments—as the Word of God—in the county courthouses. All their other actions with respect to the displays were intended to achieve that overarching religious objective.

Not surprisingly, the counties' courthouse displays of the Ten Commandments achieved their intended *effect* of advancing and endorsing the religious beliefs of particular faiths. The focus of this brief, however, is the independent

significance under the Establishment Clause of a government actor's actual *purpose*.

Petitioners and their *amici* seek to use this case to overturn long-standing precedent from this Court affirming time and again that when the government acts with the actual purpose of advancing, endorsing, inhibiting, or disapproving religion in general or a particular faith specifically, it violates the Establishment Clause. The Court should firmly reject this attempt to overturn well-established doctrine, which reflects the core Establishment Clause mandate that government must remain neutral in matters of religion. Neutrality is violated by a purpose to advance, endorse, inhibit, or disapprove religion or religious belief. Even if, unlike the posting of the displays at issue here, a government action did not result in an improper effect, government must not be allowed to pursue improper religious or anti-religious purposes, rather than act for legitimate secular ends. If the Court were to abandon its long-standing commitment to enforcing the Establishment Clause's concern with actual government purpose, this would open the door to blatant pursuit by government of religious ends dressed up in a thin, purportedly secular veneer, like the displays in this case. The purpose test has stood the test of time. Its elimination would serve no end except to unleash the very sectarian conflict in politics that the Establishment Clause was meant to guard against.

Nothing justifies the radical surgery proposed by petitioners and others here. There is no basis to the claim that inquiring into actual purpose is somehow unmanageable. Courts routinely determine the actual purpose motivating the actions of persons in many other areas of the law. Indeed, the actual purpose of government officials is critical in many areas of constitutional law in addition to the Establishment Clause. For example, government action that is not facially

discriminatory but has disparate effects will be invalidated under the Equal Protection Clause only if the government decisionmaker acted because of, rather than in spite of, the differential impact. Inquiring into actual purpose is no less manageable under the Establishment Clause than under the Equal Protection Clause, and it is equally critical to the constitutional guarantees of neutrality of both.

The United States' suggestion that the Court adopt an "objective purpose" test is just a *sub rosa* plea to eliminate inquiry into the decisionmaker's actual purpose altogether. *See* Brief Amicus Curiae of United States (December 8, 2004) (hereinafter, "U.S. Br.") What the United States labels "objective purpose" is nothing other than the objective *effect* of a display or other government action. *See id.* The United States' test thereby retains a purpose prong in name alone. If adopted, this proposal would prevent courts from inquiring into the actual purpose that motivated government action, even when an official candidly admits that the action was for the purpose of endorsing or disapproving particular religious views. The Court should not accept this invitation to put blinders on the Establishment Clause.

To fulfill its critical role in guarding against government officials undertaking to advance or inhibit religion or religious belief, the examination of the actual purpose behind a government action under the Establishment Clause must have teeth. Thus, as this Court has frequently made clear, moderate deference to the stated purposes of government officials should not prevent courts from exposing sham secular purposes. As in any area of the law, there should be no artificial limitations on the evidence that may be considered in discerning whether the actual purpose of a government actor is impermissible under the Establishment Clause. Equally important, the mere presence of some secular purpose cannot save invalid actions when the

government's predominant purpose is one of advancing or endorsing religion. The Court should not countenance subterfuges that would make a mockery of the Establishment Clause.

ARGUMENT

I. Barring Government From Acting With The Actual Purpose Of Advancing Or Endorsing Religion Is A Core Function Of The Establishment Clause.

This Court's precedents establish unambiguously that the Establishment Clause bars government officials from acting with the actual purpose of advancing or endorsing—or inhibiting or disapproving—religion generally or particular religions specifically. No ground exists for brushing aside *stare decisis* and departing from that settled precedent. To the contrary, preventing government from pursuing an actual purpose of advancing, endorsing, inhibiting, or disapproving religion is critical to achieving one of the Establishment Clause's central goals: ensuring that government remains neutral in religious matters. Nor is there merit to the argument that inquiry into actual purpose should be abandoned because it is somehow unworkable. Discerning an actor's actual purpose or intent is a core competence of the judicial power, and one that is central in many other areas of constitutional law. There is no justification for abandoning the time-tested purpose inquiry—whether overtly, as requested by petitioners, or covertly, by collapsing purpose into effect under the rubric of "objective purpose," as proposed by the United States.

A. Under Long-Settled Precedent, Improper Religious Purpose Is a Sufficient and Independent Ground for Setting Aside Government Action.

This Court has long held that under the Establishment Clause, government officials may not act with the purpose of

advancing or endorsing religion. *See, e.g., Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). The Court reaffirmed the independent importance of assessing purpose when it summarized its Establishment Clause jurisprudence in the three-prong test articulated by *Lemon v. Kurtzman*, 403 U.S. 602, 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (citations and quotation marks omitted). The Court has repeatedly applied that analytic framework when reviewing government actions challenged under the Establishment Clause. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592 n.44 (1989) (citing cases). As the Court recently reaffirmed, "[t]he Establishment Clause . . . prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002); *see also id.* at 669 (O'Connor, J., concurring) (explaining that Establishment Clause purpose and effect "test today is basically the same as that set forth in *School District of Abington Township v. Schempp*, 374 U.S. at 222").[2]

The prongs of the established test are each independent and conclusive, so that a finding of improper purpose under the first prong is dispositive. "If the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria is necessary.'" *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)); *see also County of Allegheny*, 492 U.S.

[2] In *Agostini v. Felton*, 521 U.S. 203, 218, 232-33 (1997), the "entanglement" prong was folded into the "effects" prong, at least with respect to cases concerning government aid to religious educational institutions. Entanglement is not at issue in this case, however.

at 592 (noting that purpose was decisive in *Wallace* and *Edwards*). Even if a government program may not ultimately have an unconstitutional effect, a finding of religious purpose invalidates the government action under the Establishment Clause. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) ("Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail").

In recent years, particularly in cases concerning religious displays on public property, the Court has refined its Establishment Clause jurisprudence by emphasizing the question of whether the government improperly *endorses* (or disapproves of) religion. *See, e.g., Allegheny*, 492 U.S. at 592-93; *Lynch v. Donnelly*, 465 U.S. 668, 690-92 (1984) (O'Connor, J., concurring). Some lower courts—most notably and explicitly the Third Circuit—have stated that "[u]nder the 'endorsement' approach, we do not consider the County's purpose in determining whether a religious display has violated the Establishment Clause; instead, we focus on the *effect* of the display on the reasonable observer." *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247, 261 (3d Cir. 2003).[3] But that directly contradicts this Court's formulation of the endorsement standard, which separately preserves both a purpose and an effect prong.

[3] *See also Modrovich v. Allegheny County*, 385 F.3d 397, 401 (3d Cir. 2004); *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144, 174 (3d Cir. 2002), *cert. denied*, 534 U.S. 942 (2003). Although the Third Circuit continues to consider purpose separately under *Lemon*, it treats the endorsement standard and *Lemon* as "separate tests" to be applied seriatim and, as explained above, eliminates consideration of actual purpose in favor of a purely objective standard when considering endorsement.

As Justice O'Connor explained in her seminal concurrence in *Lynch*, "[t]he meaning of a statement to its audience depends both on the intention of the speaker, and on the 'objective' meaning of the statement to the community." 465 U.S. at 690 (O'Connor, J., concurring). "Examination of both the *subjective* and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning." *Id* (emphasis added). Accordingly, improper endorsement (or disapproval) of religion may be established *either* by showing an improper purpose of endorsement *or* by showing an improper effect of endorsement. *See id.* ("To answer th[e] question" of endorsement, court "must examine *both* what [the state] intended to communicate" and "what message [it] actually conveyed" to a reasonable observer) (emphasis added). Under this analysis, then,

> [t]he *purpose prong . . . asks whether government's actual purpose is to endorse or disapprove of religion*. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. *An affirmative answer to either question should render the challenged practice invalid.*

Id. (emphasis added). Accordingly, the endorsement analysis preserves the Court's well-established framework for invalidating government action that has an improper actual purpose, regardless of its objective effect (and vice versa). *See* Richard H. Fallon, Jr., *Implementing the Constitution*, 111 Harv. L. Rev. 56, 92-93 (1997) ("[T]he 'endorsement' test that has been favored by some Justices in recent years as a measure of Establishment Clause violations retains a place for inquiries into governmental purpose").

In sum, the Court "continue[s] to ask whether the government acted with the purpose of advocating or

inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini*, 521 U.S. at 222-23.

B. Prohibiting Government From Acting With the Actual Purpose of Advancing or Endorsing Religion Is Necessary to Safeguard the Fundamental Establishment Clause Mandate of Government Neutrality with Respect to Religion.

No ground exists for disturbing this settled understanding that, regardless of the objective effect of its action, government may not act with an improper religious purpose. To the contrary, the independent significance of the inquiry into purpose is a crucial lynchpin for maintaining a core Establishment Clause mandate: government neutrality concerning matters of religion. Ensuring that government actions are not motivated by an improper purpose of advancing, inhibiting, endorsing, or disapproving religion is necessary to guarantee that neutrality.

The Court has long recognized that a fundamental premise of the Religion Clauses is that "the State is firmly committed to a position of neutrality" with respect to religion. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). Thus, "'[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (quoting *Comn . for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-793 (1973)). Disapproval of religion is likewise proscribed. *See Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring) ("[G]overnment is to be neutral in matters of religion, rather than showing either

favoritism or disapproval towards citizens based on their personal religious choices . . .").[4]

Prohibiting government from acting with the purpose of advancing or endorsing religion is critical to safeguarding this neutrality. "The Establishment Clause's 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987); *see also Schempp*, 374 U.S. at 222 (framing the test for neutrality in terms of purpose and effect). It also ensures that neutrality is more than merely superficial. "Purpose is a necessary backstop to facial neutrality. A law's facially neutral categories may be pretextual, especially where they produce disproportionate effects. The absence of a strong secular justification for the categorization is the best evidence that the program favors religion over nonreligion, or one religion over another." Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 144 (1992); *see also id.* ("abandoning the purpose prong would be an overreaction").[5] Indeed, one commentator has even

[4] Of course, neutrality "is by no means the only 'axiom in the history and precedent of the Establishment Clause.'" *Mitchell v. Helms*, 530 U.S. 793, 839 (2000) (O'Connor, J., concurring) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring)); *see also Mitchell*, 530 U.S. at 884 (Souter, J., dissenting) ("The insufficiency of evenhandedness neutrality as a stand-alone criterion of constitutional intent or effect has been clear from the beginning of our interpretive efforts").

[5] Accordingly, inquiry into purpose may also serve to confirm instances when government action has the improper effect of advancing (or inhibiting) religion. Determining whether a government action has the impermissible effect of endorsing religion "depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results

argued that "the secular purpose doctrine cannot be discarded . . . without effectively reading the Establishment Clause out of the Constitution altogether." Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 88 (2002). Whether this overstates the case or not, it is beyond peradventure that a government act taken with improper purpose necessarily violates the Establishment Clause in its own right, regardless of the act's effect.

In sum, "the secular purpose requirement . . . serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce." *Wallace*, 472 U.S. at 75-76 (O'Connor, J., concurring).

C. Determining a Government Actor's Actual Purpose Is Not Unmanageable But Is Instead a Core Competence of the Judiciary Exercised in Many Areas of Constitutional Law.

The Court should also reject the argument that inquiring into a government actor's actual purpose is somehow unworkable. In many areas of the law—not least constitutional law—courts must frequently determine the actual purpose or intent of persons, including government actors and entities.

with unanimous agreement at the margins." *Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring). In these difficult cases, evidence of an improper purpose—which may be undisputed or candidly admitted—can tip the balance toward a finding of improper effect.

1. Determining the actual purpose behind an action is a core competence of the judiciary.

Some members of the Court have suggested abandoning the purpose test on the ground that determining the subjective motivation behind a government act is too difficult. *See Edwards*, 482 U.S. at 640 (Scalia, J., dissenting). On this view, "while it is possible to discern the objective 'purpose' of a statute, (i.e., the public good at which its provisions appear to be directed), . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task." *Id.* at 636. *But see infra* Section I.D (criticizing concept of "objective purpose"). Because of this difficulty, the argument goes, "judges . . . will very likely reach the wrong conclusion." *Id.*[6]

That objection to the purpose inquiry is fundamentally misplaced. There is nothing mysterious about determining an actor's purpose. "[E]ven a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes, Jr., *The Common Law* 3 (Little, Brown & Co. 1923) (1881); *see also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 322 (1997) ("[I]t is not particularly difficult to make reasonable judgments about the motivations behind legislation in most cases"). Courts, including this Court, have looked to a variety of sources, including statutory text, social context, and the history of government action, to determine the actual purpose behind government action. *See infra* Part II.

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[6] The argument that determinations of purpose are especially complex with respect to collegial bodies has also been advanced. *See Edwards*, 482 U.S. at 638 (Scalia, J., dissenting). This problem is alleviated under the Establishment Clause by framing the purpose inquiry as one of "predominance." *See infra* Part III. In any event, this difficulty is no greater under the Establishment Clause than it is under any of the other areas of law in which intent is relevant. *See infra* Section I.C.2.

In some cases, the existence of an improper purpose is not even a subject of dispute. Not every government actor with the actual purpose of advancing or endorsing religion dissembles or tries to hide that purpose. Instead, he or she may proclaim it, as then-Alabama Chief Justice Moore did when erecting a granite monument inscribed with the Ten Commandments in the rotunda of the state Judicial Building. As the Eleventh Circuit made clear in finding an improper purpose, "no psychoanalysis or dissection is required" in such a case, "where there is abundant evidence, including his own words, of the Chief Justice's purpose." *Glassroth v. Moore*, 335 F.3d 1282, 1296 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003). Similarly, in *Wallace v. Jaffree*, the Court found "unrebutted evidence of [improper] legislative intent," evidence which was simply "confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case." 472 U.S. at 58.

But even considering that determinations of actual purpose—like all determinations of fact—are sometimes difficult, it by no means follows that courts are ill-suited to the task. On the contrary, such determinations reflect a core competence of the judiciary. "Judicial review of legislative justifications and motives might well be the task judges are most well positioned to perform." Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L.J. 711, 729 n.45 (1994). It may even be that judges are better able to identify improper motivations than improper effects. For "if we ask what subject matter judges as a class are most knowledgeable about (aside from legal doctrine), it is surely politics. It is not physics, chemistry, biology, engineering, economics, social psychology, and the countless other disciplines" relevant to assessing the effects of government action. Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v.

Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1872, 1872-73 (1987). Thus, "the argument that courts lack the competence . . . to engage in purpose scrutiny is highly suspect." Bhagwat, 85 Cal. L. Rev. at 322.

2. Other areas of constitutional law likewise turn on the actual purpose behind government action.

Concern with government purpose pervades constitutional law. Decades of constitutional jurisprudence rest on "the idea that the quality and permissibility of governmental acts, and hence their constitutionality, should sometimes depend on their purposes." Fallon, 111 Harv. L. Rev. at 98.

In Commerce Clause cases, for example, the Court has examined purpose as well as effect in deciding whether a state law improperly discriminates against interstate commerce. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) ("The choice of constitutional means . . . cannot guarantee the constitutionality of the program as a whole. . . . [O]ur cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects"); *Bachus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (noting that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of . . . discriminatory purpose") (citing *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 352-53 (1977)). Challenges under the Bill of Attainder Clause require examination of legislative purpose under a "test of punishment [that] is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 480 (1977). Purpose has likewise been found determinative in Free Exercise cases. *See, e.g., Church of the Lukumi Babalu*

Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down facially neutral ordinance enacted with actual purpose of targeting practices of Santeria religion).

Nowhere has the Court paid greater consideration to governmental purpose than in its Equal Protection jurisprudence. The Court's decisions in *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), made discriminatory purpose the central focus of claims of racial discrimination brought under the Equal Protection Clause. *See Village of Arlington Heights*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). And the Court in *Adarand Construction v. Pena*, 515 U.S. 200 (1995), justified strict scrutiny analysis by its ability to "smoke out" improper legislative "goal[s]." *Id.* at 226 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). But concern with discriminatory purpose has not been limited to racial classifications or heightened scrutiny. Even under rational basis review, some purposes "such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *accord Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

The relevant purpose in these other areas of law, as under the Establishment Clause, is the actual purpose of the government decisionmaker, not a hypothetical "objective purpose" attributed to her by an observer. As the Court noted in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), "'discriminatory purpose . . . implies the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Id.* at 279. Thus, when asked to review a facially neutral provision of the Mississippi State

Constitution, the Court concluded without dissent that it violated the Equal Protection Clause because its "original enactment . . . was motivated by a desire to discriminate against blacks." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). And the Court did so despite its observation that "[p]roving the motivation behind official action is often a problematic undertaking." *Id.* at 228.

Questioning the role or utility of inquiring into legislative purpose in Establishment Clause challenges would call into question the purpose analysis in these other areas of law where it also has been central. Occasional difficulty in assessing purpose cannot justify abandonment, or even denigration, of this essential component of Establishment Clause jurisprudence. Indeed, "it would be unprincipled to abandon the purpose prong of the *Lemon* test on these grounds if the Court intends to inquire into legislative purpose in other contexts." McConnell, 59 U. Chi. L. Rev. at 143.

D. The Court Should Reject the United States' Suggestion That It Abandon Inquiry into Actual Purpose and Look Instead at "Objective Purpose," Which as Defined by the United States Is Synonymous with Effect.

The Court should likewise reject the argument of the United States, as *amicus curiae*, that "[t]he Establishment Clause inquiry should turn upon the objective purpose served by the display as a whole, not subjective motivation." U.S. Br. at 6. With respect to "passive displays," such as that here, the United States would limit inquiry to "the objectively discernible purpose," defined as, "whether the display itself . . . expresses favoritism for or an endorsement of religion." *Id.* at 26. Although the United States' proposal purports to preserve a separate purpose prong under the Establishment Clause, in reality the Government's so-called

"objective purpose" test collapses purpose into effect, thereby eviscerating the independent significance of the former. It is therefore in conflict with settled law and the fundamental Establishment Clause mandate of neutrality.

The Court's precedents leave no room for doubt that the "purpose" that is relevant to the Establishment Clause is the *actual purpose* behind the government's action, which has an inherently subjective aspect and cannot be reduced to an objective test. "*Lemon*'s first prong focuses on the purpose that animated the adoption of the Act." *Edwards*, 482 U.S. at 585. Purpose, properly understood in this context, is what motivates action; it is specific to the decisionmaker and necessarily subjective. This Court has made clear that it was scrutinizing actual, subjective intent in those cases where it struck down state action on the basis of impermissible religious purpose. *See, e.g., id.* at 587 (evaluating "governmental intention" and "the purpose of the legislative sponsor"); *Wallace*, 472 U.S. at 57 (noting testimony of the bill's sponsor that "[he] did not have no other purpose in mind" when he proposed the bill); *Epperson v. State of Ark.*, 393 U.S. 97, 108 (1968) ("[F]undamentalist sectarian conviction was and is the law's reason for existence"); *see also Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (explaining that this Court's Establishment Clause standard requires "inquiry into the subjective intentions of the government"), *cert. denied*, -- U.S. --, 124 S. Ct. 1750 (2004). Indeed, the Court has "consistently described the Establishment Clause as forbidding not only state action *motivated by* the desire to advance religion, but also that *intended to* 'disapprove,' 'inhibit,' or evince 'hostility' toward religion." *Edwards*, 482 U.S. at 616 (Scalia, J., dissenting) (emphasis added).

The United States' proposal that the Court should examine only the "objective purpose served by the display

itself" to determine "whether the display itself—based on its design, content, or emphasis—expresses favoritism for or an endorsement of religion," U.S. Br. at 26, truncates the inquiry into the actual purpose behind a display. While the labels "objective" and "subjective" can have varied meanings depending on context, "objective purpose" as defined by the United States refers solely to the message an objective observer would discern from the display itself.[7] That is exactly the inquiry under the Establishment Clause's *effect* test. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval"). Thus, the ultimate question to be answered by the effect inquiry—as under the "objective purpose" standard proposed by the United States—is "the 'objective' meaning of the statement in the community," whereas the ultimate question to be answered by the purpose prong is the actual "intention of the speaker." *Id.* "[B]oth the subjective and the objective components of the message communicated by a government action," *id.* at 690-91, must be neutral with respect to religion. Restricting judicial review to the objective component alone may allow government action to stand when it is intentionally taken to promote religion.

To be sure, the objective message sent by a display may well be *evidence*—in some instances, the best evidence—of the government's actual or subjective purpose in posting it. If a government official erected a display on public property

[7] Indeed, it is not at all clear what the words "objective purpose" might mean if they denote neither the actual purpose of the actor nor the objective effect of his actions. *See* Fallon, 111 Harv. L. Rev. at 73 n.99 ("The notion of a statute having an objective aim, that is different from both the subjective purpose of those who enacted it and at least partially distinct from its effects, is not wholly free from mystery").

of the Ten Commandments under a caption prominently asserting, "This is the Word of God," hardly any other inference would be possible than that the official acted with the actual purpose of advancing and endorsing the specific faiths adhering to that purely religious doctrine. In such an instance, the actual purpose and objective effect of the display would be one and the same. But that is not always true, and the objective meaning of a display is not always the only or best evidence of the actual intent of those who created the display. As Justice O'Connor explained in *Lynch*, "listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker." 465 U.S. at 690 (O'Connor, J., concurring). "If the audience is large, as it always is when government 'speaks' by word or deed, some portion of the audience . . . will inevitably receive the intended message." *Id.* But the United States' exclusive focus on whether the "objective purpose" of "the display itself" is to "express[] favoritism for or an endorsement of religion," U.S. Br. at 26, would preclude any inquiry into the "intended message" of a display, even when distinct from the "message determined by the 'objective' content of the statement." *Lynch*, 565 U.S. at 690.

The fundamental defect in the position of United States is highlighted by a hypothetical variation on the recent case of Alabama Chief Justice Moore, who "installed a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. He did so in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both state and church." *Glassroth*, 335 F.3d at 1284. His religious purpose was "self-evident" and the display plainly unconstitutional. *See id.* at 1297. If the United States' "objective purpose" standard were

accepted, however, Chief Justice Moore could have continued to pursue his actual purpose—which was admittedly to endorse a particular religious faith—by framing the monument with prominent secular window dressing, such as depictions of historical or legendary instances of secular lawgiving. If an observer of the display would believe that its "objective purpose" was to commemorate lawgiving, then it would be constitutional on the United States' view, notwithstanding Chief Justice Moore's candid admission that his actual purpose continues to be an "acknowledge[ment of] the law and sovereignty of the God of the Holy Scriptures, and . . . 'God's overruling power over the affairs of men.'" *Glassroth*, 335 F.3d at 1296. Under the United States' "objective purpose" standard, government actors could act with the most impermissible religious preferences or hostilities—provided they do so in a way that obscures their intentions. The neutrality principle would be eviscerated.[8]

Of course, that is essentially what occurred in this case. Although petitioners have not been as forthright concerning their religious purpose as was Chief Justice Moore, consideration of all the evidence in the record in this case gives rise to the unmistakable inference that the petitioners' actual purpose was to display the Ten Commandments—an indubitably religious text—no matter what.[9] The additions of purportedly secular texts—many of which emphasized the display's religious theme or, alternatively, had no discernable

[8] Indeed, the United States would not even require that the secular window-dressing combine with the religious text to create a coherent message. Any combination of secular and religious texts no matter how "uncommonly silly or disunified," U.S. Br. at 21 n.11, appears to pass muster under the Government's "objective purpose" standard.

[9] "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of secular purpose can blind us to that fact." *Stone v. Graham*, 449 U.S. 39, 41 (1980).

connection to the display of the Ten Commandments—were simply an effort to obscure the objective effect of endorsement, even while ensuring that the sacred text the officials regard as the Word of God remains enshrined in the courthouses.

II. Reviewing Courts Can And Must Look Behind Pretextual Statements Of Secular Purpose That Seek To Mask An Impermissible Religious Purpose.

In order to realize the goal of ensuring government neutrality with respect to religion, the inquiry into purpose must be rigorous. In particular, although the judiciary owes some deference to decisionmakers' statements of purpose, the inquiry is only meaningful if courts evaluate articulations of secular purpose in light of all available evidence and disregard those that are shams. The displays under consideration reflect an attempt to use secular "window dressing" to obscure or distract attention from government actions impermissibly taken to advance or promote religion. Reviewing courts must question carefully those government actions that have been modified in an effort to dilute their religiosity, to determine whether the modification reflects a genuine secular purpose, or merely attempts to camouflage the original religious purpose.

Of course, a decisionmaker's stated purpose may be religious on its face. *See, e.g.*, *Wallace*, 472 U.S. at 56-57 ("The sponsor of the bill . . . indicat[ed] that the legislation was an 'effort to return voluntary prayer' to the public schools.'") (quoting App. 50); *Glassroth*, 335 F.3d at 1296 ("Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures"). With a statement of religious purpose, a reviewing court's inquiry is at an end and the conclusion

straightforward: the action motivated by the improper purpose is unconstitutional.

But when the government advances a purportedly secular purpose, the court must verify that the stated purpose in fact motivated the challenged action. In such cases, "the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (alteration in original) (citing *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in judgment)). Thus, mere articulations of a secular purpose are clearly not sufficient to justify a challenged action. The purpose inquiry is concerned with identifying actual purpose, not a hypothetical purpose that might plausibly justify, but did not in fact motivate, the challenged action. *See Edwards*, 482 U.S. at 595 (noting that "post-enactment testimony of outside experts" who did not "participate[] in or contribute[] to the enactment of the law or its implementation" "is of little use in determining the Louisiana Legislature's purpose in enacting this statute"). "Under this Court's rulings . . . such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Stone*, 449 U.S. at 41.[10]

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[10] Courts must be especially skeptical of secular purposes that are advanced only after an action is challenged. Thus, the Seventh Circuit gave little weight to a "secular purpose of recognizing the historical and cultural significance of the Ten Commandments, issued on the eve of litigation." *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001). Similarly, in the present case, after first displaying *only* the Ten Commandments, the petitioner counties have now attempted to attribute their modified displays to a desire "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law." *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001). The Establishment Clause's purpose prong is not such a "low threshold,"

The display of material with "an obvious religious nature" to further an allegedly secular purpose should put the reviewing court on alert. *Books v. City of Elkhart*, 235 F.3d 292, 303 n.8 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001). The choice of religious texts or symbols strongly suggests that the purpose for the display was in fact religious, particularly where, as here, the religious text was the *only* material displayed originally. The United States misstates the law on this point when it asserts that "the controlling question is whether the display as a whole *serves* a secular purpose." U.S. Br. at 18 n.8 (emphasis added). On the contrary, the controlling question is, and should remain, whether the *actual purpose* behind the display was an improper one. The inclusion of secular window dressing will not affect the analysis if the government was motivated by a desire to display religious material for the purpose of advancing religious belief.

As has always been true of Establishment Clause analysis, the purpose inquiry is fact-specific. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). The true purpose of the government actor responsible for the challenged program, endeavor, or display must be evaluated in light of all relevant evidence of purpose. A court may start with the text of the statute or display, for text alone may reveal improper purpose. *See, e.g., Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314-15. But other evidence may also be relevant, and therefore essential, to a court's inquiry. *See id.* at 315 ("Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding [the] adoption

---

Freethought Soc'y, 334 F.3d at 267, as to be satisfied by such a clearly implausible post hoc rationalization.

[of the challenged policy]"); *Edwards*, 482 U.S. at 595 ("[I]n determining the legislative purpose of a statute, the Court has also considered the historical context of the statute, and the specific sequence of events leading to passage of the statute") (citations omitted). Where the text is ambiguous, whether facially neutral or presenting some combination of religious and secular material, contextual evidence may be decisive. *See Hunter*, 471 U.S. at 229 (noting without dissent that "evidence of legislative intent . . . consist[ing] of the proceedings of the convention, several historical studies, and the testimony of expert historians" was sufficient to "demonstrate[] conclusively that [the challenged provision of the Alabama state constitution] was enacted with the intent of disenfranchising blacks").

Protestations of the dissent below notwithstanding, consideration of a decisionmaker's history of conduct as evidence of purpose does not impose an "indelible unconstitutional 'taint'" on all future action. *ACLU v. McCreary County*, 354 F.3d 438, 477 (6th Cir. 2003). Evidence of a course of conduct is plainly *relevant to* the ultimate question of actual purpose, here as in all areas of the law. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309 ("[I]n light of the school's history of [unconstitutional conduct], it is reasonable to infer that the specific purpose of the policy was to preserve a popular state-sponsored religious practice") (internal quotation omitted). The inference is inescapable in this case that the actual purpose of the government actors was at all times to display the Ten Commandments in their county courthouses because of their religious significance. *Cf. Stone*, 449 U.S. at 42 (per curiam) ("Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this may be as a matter

of private devotion, it is not a permissible state objective under the Establishment Clause"). Everything else was simply a means to obtain the counties' religious end. Even the purportedly secular documents displayed with the Ten Commandments were carefully chosen and excerpted to link religion and government. That does not mean that these decisionmakers could never create a display that included some religious text if in fact the display had neither an impermissible purpose nor an impermissible effect. But in this particular case, the counties' *actual purpose* was never a permissible one.

III. The Establishment Clause Is Not Satisfied By The Mere Existence Of Some Secular Purpose, No Matter How Dominated By An Impermissible Religious Purpose.

The record in this case does not suggest that petitioners acted with *any* actual secular purpose. Their purported secular purposes were clearly pretextual, as the court below recognized. But even if the petitioners had some subsidiary secular purpose, it is clear that the *dominant* purpose behind these displays was to venerate the Ten Commandments and to have citizens reflect on that religious text.

The secular purpose requirement "is not satisfied. . . by the mere existence of some secular purpose, however dominated by religious purpose." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). This Court has frequently made clear that government action violates the Establishment Clause where it was motivated by a *predominant* religious purpose. In *Edwards v. Aguillard*, for example, the Court held that a Louisiana statute violated the Establishment Clause "because the primary purpose of the Creationism Act is to endorse a particular religious doctrine." 482 U.S. at 594. Similar standards were applied in *Wallace v. Jaffree*, *see* 472 U.S. at 56 (requiring that the "actual purpose" be

"clearly secular"), and *Stone v. Graham*, *see* 449 U.S. at 41 (identifying the "pre-eminent purpose" of the challenged state action).

Thus, a decisionmaker's purpose need not be entirely religious to violate the Establishment Clause. Dicta in *Bowen v. Kendrick*, 487 U.S. 589 (1988), does not dictate a different standard. While the majority there did suggest that "a court may invalidate a statute only if it is motivated wholly by an impermissible purpose," this statement was not essential to the holding of the case. In fact, the majority went on to hold that the statute in question "was motivated primarily, if not entirely, by a legitimate secular purpose." *Id.* at 602. Moreover, that dictum did not accurately summarize precedent. Neither *Edwards*, nor *Wallace*, nor *Stone*, all decided before *Bowen*, purported to apply a "wholly religious" standard. And Justice O'Connor, who cast the deciding vote in *Lynch*, explicitly disagreed with Chief Justice Burger's lead opinion for the Court on this point. *Compare Lynch*, 465 U.S. at 690-91 *with id.* at 681 n.6. Previous statements by the Court, such as the conclusion in *Stone*, that a challenged government action "had no secular legislative purpose, and is therefore unconstitutional," 449 U.S. at 41, described a sufficient condition for finding an Establishment Clause violation based on improper purpose, not a necessary one.

Finally, both this Court's subsequent case law and fidelity to *stare decisis* confirm that the proper standard under the purpose prong continues to be that state action motivated by a predominant religious purpose violates the Establishment Clause. The majority in *Santa Fe* struck down a challenged school prayer policy based on a "reasonable . . . infer[ence]" regarding "the specific purpose of the policy." 520 U.S. at 309. Nowhere did the Court determine that the actual policy was "wholly" religious. Indeed, such a

determination would be exceedingly difficult to make, for "[r]arely can it be said that a legislature or administrative body . . . made a decision motivated solely by a single concern." *Village of Arlington Heights*, 429 U.S. at 265. Insistence on such a standard would render the secular purpose requirement a virtual dead letter. Fidelity to *stare decisis* forbids the casual dismissal by dictum of a component of Establishment Clause analysis that has endured for over forty years. *See Zelman*, 536 U.S. at 648-49 (O'Connor, J., concurring).

A reviewing court must therefore ensure that, when government decisionmakers were influenced by a purpose to advance religion, that religious purpose did not predominate. This may be accomplished by requiring that, once a plaintiff establishes the existence of an improper religious purpose, the burden shift to the defendant to show that the challenged action would have been undertaken even in the absence of such impermissible motive. This allocation of proof has been adopted by the Court in other contexts where purpose is relevant to the constitutionality of government action, *see, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Hunter*, 471 U.S. at 222; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Village of Arlington Heights*, 429 U.S. at 252, and accords with purpose analysis inquiry generally. *See* Fallon, 111 Harv. L. Rev. at 72 ("Once it is agreed which purposes are forbidden, the question is whether, but for the influence of some illegitimate consideration in motivating one or more relevant decisionmakers, the government would likely have enacted a challenged statute or taken other contested steps").

Where a display is erected with the purpose of exhibiting religious texts or symbols in order to advance religion or religious belief, and additional secular material is included as

mere dressing, the analysis is simple: the frame would not be hung but for the picture. That is clearly the case here.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 21, 2005

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Nos. 03-1500 and 03-1693

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

McCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE*, ANTI-DEFAMATION LEAGUE AND PHILIP A. CUNNINGHAM, PH.D., EXECUTIVE DIRECTOR, CENTER FOR CHRISTIAN-JEWISH LEARNING AT BOSTON COLLEGE, IN SUPPORT OF PETITIONER IN NO. 03-1500, AND IN SUPPORT OF RESPONDENTS IN NO. 03-1693

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INTEREST OF *AMICI CURIAE*[1]

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. It is today one of the leading civil rights and human relations organizations in the world. ADL believes that its stated goals, as well as the general stability of our democracy, are best served through strict separation of church and state and commensurately strict enforcement of the Free Exercise Clause. As an organization rooted in the Jewish community whose mission includes advancing interfaith relations, ADL seeks to offer the Court a clearer understanding of the ineluctably religious provenance of the Ten Commandments and establish why a government-sponsored display of the Decalogue is not inclusive, but rather detrimental to interfaith relations.

Philip A. Cunningham, Ph.D., is Executive Director of the Center for Christian-Jewish Learning and Adjunct Professor of Theology at Boston College. His academic interests include biblical studies, religious education, and Jewish-Christian relations. He is a member of the Advisory Committee on Catholic-Jewish Relations for the United States Conference of Catholic Bishops, and he is a co-convener of the Catholic Biblical Association of America's continuing seminar on Biblical Issues in Christian-Jewish Relations. Dr. Cunningham's curriculum vitae is reproduced in the attached Appendix at 3a. His expertise sheds light on the Decalogue's religious history and its continuing significance as a religious text and symbol.

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[1] This brief concerns, and has been docketed in, both cases before the Court on displays of the Ten Commandments, supporting petitioner in No. 03-1500 and respondents in No. 03-1693. All parties in both dockets have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

The mission of the Center for Christian-Jewish Learning at Boston College is to encourage new relationships between Christians and Jews based not merely on tolerance but on full respect, mutual enrichment and collaborative theological research. This purpose flows from the mission of Boston College and responds to the Roman Catholic Church's vision as expressed by the Second Vatican Council. Under the Center's auspices, scholars representing diverse Jewish and Christian perspectives study all aspects of these related yet distinct faiths. The Center also offers programs in the university and the wider community in which Christians and Jews explore their traditions together. In short, the Center uses the scholarly resources of a Catholic university to encourage mutual knowledge between Christians and Jews at every level.

SUMMARY OF ARGUMENT

The Establishment Clause, at its core, prohibits government from taking sides, or even appearing to take sides, on matters of religious belief. In two cases now before the Court, government has erected or maintained a monumental or framed display of a particular version of the Ten Commandments, outside of a secular program of educational or historical study or debate. Government is proclaiming a message, not inviting a discussion. Yet, that message is fundamentally inconsistent with government's role under the First Amendment.

Often overlooked in legal discussions of the Ten Commandments is the theological understanding of the Ten Commandments, as a text with deep religious meaning, but also with different meanings even among the religious traditions that accept the Decalogue's authenticity as binding rules of law. This brief supplies that theological understanding, and thereby defines the message generally conveyed by public displays of the Decalogue to the reasonable, knowledgeable observer. That message is critical to a proper application of the principles enshrined by the Establishment Clause.

Theological scholarship underscores what this Court recognized in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), that the Ten Commandments are an inherently religious text that no state may embrace. The belief of some state officials that the Decalogue can convey merely a secular message has no foundation in either the history of that document in Judaism and Christianity or in the role it still plays in both religions. This brief's discussion of religious sources and scholarship underscores how the Ten Commandments are a vital expression of religious identity and symbolism – albeit an expression that is far from uniform or free of doctrinal controversy. As we show through historical events and the works of religious scholars over the last two millennia, the Decalogue is not symbolic of a uniform Judeo-Christian legal tradition, but is in fact at the center of historical differences between two different legal traditions. Thus, the notion of the Judeo-Christian tradition – which itself was a mid-twentieth century innovation by American Protestant thinkers – does not provide a theological base on which to build a legal justification for government's display of the Decalogue.

For Jews, the Ten Commandments are part of God's unique covenant with the people of Israel as God's chosen people, and one part of a wider set of binding, biblical laws of divine origin. For Christians, the Ten Commandments are fundamental principles of natural law that, as restated by Jesus, apply to *all* humanity. By viewing the Decalogue in this manner, divorced from its original context at Mount Sinai, early Christianity rejected the remainder of Jewish law – the Law of Moses in the first five books of the Bible (the Torah or Pentateuch) – as outmoded rules that do not apply to the new people of God, the Christians. Accordingly, while the Ten Commandments have important religious meaning for Christians, they also symbolize Christianity's rejection of other principles of Jewish law. The Ten Commandments historically have been used as a symbol of these religious differences. For example, Christian artwork once depicted the two tablets of the Decalogue as a symbol for Judaism's decline.

Any secularized, general notion of Judeo-Christian principles masks this historic tension between these different religious legal traditions, while excluding altogether persons of other religious faiths or with no religious beliefs. That tension is real in the context of these cases. Even the arrangement and wording of the Commandments find no common ground among these religions – yet another example of the Decalogue as a source of theological disagreement. Jewish scholars in particular emphasize that the "Lord your God" who speaks the Commandments is the God who freed them from slavery in Egypt, making clear from that theological perspective His special relationship with the people of Israel and the Decalogue's unique applicability to the Jews.

Government displays of the Ten Commandments therefore will inevitably "take sides," as no authentic display of the Decalogue's text can gloss over the different words and traditions ascribed to this part of the Hebrew scriptures while also taking account of the beliefs of Americans with faiths (like Islam) that do no accept the Decalogue as scripturally accurate, or of Americans with other faiths or no religion at all. This difficulty in creating a generic, secularized notion of the Decalogue acceptable to those of all faiths or of no faith is evident in the record before this Court. It is also why the Court's precedents on "ceremonial deism" have no place in the constitutional jurisprudence applicable to state-sponsored displays of the Ten Commandments' sacred text.

The displays here do have the effect of endorsing a religion, while not respecting others. While the designers of the Texas monument say they sought to erect a "nonsectarian" monument to God, they could do so only by endorsing Judaism or Christianity and ignoring all other religions. By placing Jewish symbolism alongside symbols for Jesus as the Messiah, and elevating a Christian translation of the Ten Commandments for special veneration apart from the rest of Mosaic law, the monument endorses a Christian religious view. The Kentucky courthouse displays make no attempt to be inclusive, instead using a Protestant translation of the Decalogue, omitting

entirely the text that is most fundamental to the Jewish understanding of the Ten Commandments, i.e., the opening reference to the people of Israel ("I the Lord am your God, who brought you out of the land of Egypt, the house of bondage . . . .").

The displays in Texas and Kentucky therefore either promote one religion's view of the Ten Commandments, ignoring the beliefs of others; or they homogenize the Ten Commandments, thereby giving official sanction to minimizing the divergent yet fundamentally religious beliefs of *both* Jews and Christians regarding this sacred text. The text of the Decalogue is no slogan that state officials can fit onto a coin or add to a pledge. The proponents of the Texas and Kentucky displays would undoubtedly agree with *amici curiae* that the words and tablets of the Decalogue have not lost their religious significance and that any judicial finding to the contrary would demean their beliefs and those of many Americans. Indeed, it is the invocation of the Establishment Clause in these very cases that will best serve to protect religion from the weakening of religious authority and belief that can come from secular officials embracing religious practices and texts in a homogenized, secular ceremony or display.

There is no single, generic, secular version of the Ten Commandments. In attempting to construct a display of that sort, government unavoidably must choose – or, to a reasonable, knowledgeable observer, appear to choose – among religious interpretations of the deity and His commands. Religion, and not just the Ten Commandments, is undeniably of historical and cultural importance, but that fact does not justify government displays proclaiming selected religious messages on capitol grounds or courthouse walls. As with any well-known religious prayer of a particular sect, the display of the text of the Decalogue conveys a religious message in this context, in which the display is not part of any program of educational or historical study. Accordingly, the displays here violate the Establishment Clause and should be declared unlawful.

ARGUMENT

Government-sponsored displays of religious subjects make for hard cases, as this Court's own precedents demonstrate. The current conflict before the Court makes clear that monuments to the Ten Commandments are no exception. But to echo an observation made by Justice Brennan, these cases are hard "not because the principles of decision are obscure," but rather because the values expressed in the Ten Commandments are so familiar and, ostensibly, uncontroversial. *See Lynch v. Donnelly*, 465 U.S. 668, 696 (1984) (Brennan, J., dissenting) (commenting on difficulty of case involving crèche). Thus, there is the temptation to view a governmental display of the Ten Commandments as a "nonsectarian" display of generic "Judeo-Christian" principles underlying an American secular legal tradition, rather than as government endorsement of religion.

The history of the Ten Commandments squarely contradicts this view, and, as Justice Holmes observed, "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), especially in Establishment Clause jurisprudence, *see Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (quoting Justice Holmes). As this Court recognized in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Decalogue is an inherently religious text. Moreover, history reveals that the Decalogue represents a flashpoint in a longstanding theological conflict between Jews, who regard it as an expression of God's unique covenant with Israel, and Christians, who venerate the Decalogue as the expression of universal natural law while rejecting the rest of Mosaic law as binding on them.

As the historical and religious references in this brief illustrate, a government that displays a particular religion's version of the Decalogue in the manner now before this Court cannot avoid endorsing one religion's viewpoint while denigrating another's; nor can it avoid alienating those with no religion and adherents of other faiths, some of which, like Islam, regard the Decalogue as an expression of a corrupted textual tradition. These displays

thereby violate the core requirement of the Establishment Clause, which is that government may not take sides, or even appear to do so, on these matters of faith. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . .").

I. The Ten Commandments Are a Religious Text, Subject to Differing Versions and Interpretations by Different Religions.

The scriptures of ancient Israel present the Ten Commandments, referred to in Hebrew as *asereth ha-devarim* (the "Ten Words" or the "Decalogue"), *Deuteronomy* 4:13, 10:4,[2] in two unnumbered lists. The first enumeration of the Decalogue appears in Exodus:

> God spoke all these words, saying:
>
> I the Lord am your God, who brought you out of the land of Egypt, the house of bondage; You shall have no other gods besides Me.
>
> You shall not make for yourself a sculptured image, or any likeness of what is in the heavens above, or on the earth below, or in the waters under the earth. You shall not bow down to them or serve them. For I the Lord your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, but showing kindness to the thousandth generation of those who love Me and keep My commandments.

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[2] Biblical citations in this Section and in Section II.A refer to the 1999 Jewish Publication Society *Tanakh* translation found in THE JEWISH STUDY BIBLE (Adele Berlin & Marc Zvi Brettler eds., 2004). All other biblical citations in this brief, starting with Section II.B, refer to the Christian New Revised Standard Version found in THE NEW OXFORD ANNOTATED BIBLE (Bruce M. Metzger & Roland E. Murphy eds., 1994). Both text and verse numbers (but not chapter numbers) vary between these versions' renditions of the Hebrew scriptures.

You shall not swear falsely by the name of the Lord your God; for the Lord will not clear one who swears falsely by His name.

Remember the sabbath day and keep it holy. Six days you shall labor and do all your work, but the seventh day is a sabbath of the Lord your God: you shall not do any work – you, your son or daughter, your male or female slave, or your cattle, or the stranger who is within your settlements. For in six days the Lord made heaven and earth and sea, and all that is in them, and He rested on the seventh day; therefore the Lord blessed the sabbath day and hallowed it.

Honor your father and your mother, that you may long endure on the land that the Lord your God is assigning to you.

You shall not murder.

You shall not commit adultery.

You shall not steal.

You shall not bear false witness against your neighbor.

You shall not covet your neighbor's house: you shall not covet your neighbor's wife, or his male or female slave, or his ox or his ass, or anything that is your neighbor's.

Exodus 20:1-14. A second version of the Commandments appears in Deuteronomy, following an introduction by Moses explaining their origin:

> Moses summoned all the Israelites and said to them: Hear, O Israel, the laws and rules that I proclaim to you this day! Study them and observe them faithfully!
>
> The Lord our God made a covenant with us at Horeb [Mt. Sinai]. It was not with our fathers that the Lord made this covenant, but with us, the living, every one of us who is here today. Face to face the Lord spoke to you on the mountain out of the fire . . . saying . . . .

Deuteronomy 5:1-5. There follows a similar list of the Commandments, *see id.* 5:6-18, that differs from the Exodus version in a few notable respects. While Exodus provides that God's people should observe the Sabbath because God rested on that day after creating the world, *Exodus* 20:11, in Deuteronomy the commandment derives from Israel's freedom from slavery: "Remember that you were a slave in the land of Egypt and the Lord your God freed you from there with a mighty hand and an outstretched arm; therefore the Lord your God has commanded you to observe the sabbath day." *Deuteronomy* 5:15. Further, the Deuteronomic version reinforces Exodus' command to honor one's parents with the added injunction "as the Lord your God has commanded you, that you may long endure, and that you may fare well, in the land that the Lord your God is assigning to you." *Id.* 5:16.

While both Exodus and Deuteronomy present the Commandments in unnumbered lists, Jews and Christians later organized them in groups of ten, as seen in the attached Appendix at 1a. The differences in their respective groupings reflected a preference between the Exodus and Deuteronomic versions and the different theological emphases of the two communities. *See* WALTER J. HARRELSON, THE TEN COMMANDMENTS AND HUMAN RIGHTS 15-40 (rev. ed. 1997). Thus, Jews include the statement "I am the Lord your God, who brought you out of the land of Egypt, out of the house of slavery" in the First Commandment, to emphasize God's special covenant with the people of Israel. *See* Moshe Greenberg, *The Decalogue Tradition Critically Examined*, *in* THE TEN COMMANDMENTS IN HISTORY AND TRADITION 83, 99 (Ben-Zion Segal & Gershon Levi eds., Engl. ed. 1990); *infra* Section II.A. By contrast, Roman Catholics and some Protestants typically do *not* include this statement as part of the Commandments themselves – a practice exemplified by both the Kentucky courthouse displays and the Texas monument. *See ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 443 n.2 (6th Cir. 2003); Pet. for Cert. at 8, *Van Orden v. Perry*, No. 03-1500 (filed Mar. 31, 2004) (showing the statement's inclusion in a general heading, not as part of the First Commandment).

Similarly, Jews and many Protestants include the rule against idolatry as a separate commandment, while Catholics include the rule in the First Commandment or omit it entirely. Further, while the Jewish version of the Decalogue proscribes "murder," many Christian translations construe the commandment more broadly to ban all killing. Finally, Jews and most Protestants group the various "coveting" rules into a single commandment, while Catholics and Lutherans break them into two separate commandments. *See* Appendix at 1a. These differences have religious significance, and government is unavoidably involved in religion by selecting a version of the Ten Commandments to present publicly.

Moreover, whatever its form, the Decalogue is scripturally authoritative *only* for Jews and Christians. Islam teaches that Jews and Christians have corrupted the biblical texts and that, as a result, the Quran is the only fully accurate revelatory text. *See, e.g.*, HUSTON SMITH, THE RELIGIONS OF MAN 203 (1958). The Quran contains no counterpart to the Decalogue, although commandments given by the Prophet (not by Allah) in 6:151-153 are somewhat similar in form.[3] Asian religious traditions have no analog whatsoever.

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[3] Those verses provide:

> Say: "Come, I will tell you what your Lord has made binding on you: that you shall serve no other gods besides Him; that you shall show kindness to your parents; that you shall not kill your children because you cannot support them (We provide for you and for them); that you shall not commit lewd acts, whether openly or in secret; and that you shall not kill – for that is forbidden by God – except for a just cause. Thus God exhorts you, that you may grow in wisdom."
>
> Do not tamper with the property of orphans, but strive to improve their lot until they reach maturity. Give just weight and full measure; We never charge a soul with more than it can bear. Speak for justice, even if it affects your own kinsmen. Be true to the covenant of God. Thus He exhorts you, so that you may take heed.

(Continued on following page)

II. The Decalogue Is Not Part of a Generic "Judeo-Christian Tradition" and Historically Has Been a Significant Source of Tension Between These Two Faiths.

A. The Decalogue Enjoys a Special Status in the Jewish Tradition.

The special status of the Decalogue for Jews is evident from the scriptures themselves: The Decalogue was directly revealed by God. *See Exodus* 20:1; *Deuteronomy* 5:4-5. The Bible also tells that God Himself inscribed the words of the Decalogue directly onto stone tablets. *See Exodus* 24:12, 32:15-16; *Deuteronomy* 9:10. While the substance of some commandments was shared by neighboring cultures, this emphasis that the commandments issued directly from God is largely without parallel. Among Orthodox Jews today, this biblical stress on the divine origins of the Decalogue extends to the entirety of the Torah, the first five scriptural books of *Bereshit* (Genesis), *Shemot* (Exodus), *Vayiqra* (Leviticus), *Bemidbar* (Numbers), and *Devarim* (Deuteronomy). Other books come from prophets, sages, or kingly courts, but the Torah comes directly from God. The Ten Commandments, therefore, are no different from, and an integral part of, a larger religious text, all of which is sacred.

The Torah narrates several binding legal agreements between God and human beings. In Genesis, for example, God directs Noah, the other survivors of the great flood, and their descendants – in other words, all of humanity at that time – to populate the earth, not to eat living meat, and not to shed human blood because humanity is created in the divine image. *Genesis* 9:1-11. Eventually, the rabbis referred to these commands (along with God's commands to Adam and Eve) as the Noahide commands, which are

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> This path of Mine is straight. Follow it and do not follow other paths, for they will lead you away from Him. He thus exhorts you, so that you may guard yourself against evil.

THE KORAN 6:151-53 (N.J. Dawood trans., Penguin Books 5th rev. ed. 1999).

binding on the *entire* human race. The Decalogue, however, is different. God presented the Decalogue as part of His singular covenant with the Israelites, all of whom had assembled at Mt. Sinai (Horeb). *See Deuteronomy* 5:1-5. The uniqueness of the covenant is apparent in the initial words of the Decalogue: It is the Lord God *who brought Israel out of Egypt* who commands obedience, *see Exodus* 20:2, and the people of Israel may have no other deities nor make any image of the divine lest they disobey the One responsible for their very survival as a people, *see id.* 20:3-4. After hearing the Decalogue, the people of Israel solemnized the covenant by sprinkling blood on themselves and on an altar, *see id.* 24:3-8, and exclaiming, "All that the Lord has spoken we will faithfully do!" *Id.* 24:7.

For Jews, therefore, the Ten Commandments are more than a mere summary of their legal obligations: Together with the rest of Mosaic law in the Torah, they express Jews' self-understanding as a people chosen by God from all the nations of the world to have a unique relationship with Him and who, as a result, bear unique responsibilities. The Decalogue makes greater demands on the Jews than the universally applicable Noahide laws, and the terms of the Sinai Covenant, including the Decalogue, are unique to the Jewish people.

B. Christianity Rejected Jewish Law but Continued to Venerate the Decalogue as a Religious Text Divorced from Its Jewish Origin.

Christianity emerged in the first century of the Common Era ("c.e.") as a Jewish eschatological movement whose adherents believed that Jesus was the messiah, or Christ, who would save the people of Israel from the Gentile-dominated world. As Christianity spread throughout the eastern Roman Empire, however, non-Jewish populations eventually dominated the membership of the Church, contributing to the separation of Judaism and Christianity. *See generally* JAMES D.G. DUNN, THE PARTINGS OF THE WAYS: BETWEEN CHRISTIANITY AND JUDAISM AND THEIR SIGNIFICANCE FOR TH CHARACTER OF CHRISTIANITY

(1991). This transition generated many disputes over whether all the Laws of Moses governed non-Jewish Christians. Following considerable debate displayed in the pages of the New Testament,[4] Christians generally did not follow Mosaic law, with one notable exception: the Ten Commandments, which they embraced in modified form.

Perhaps because of the biblical traditions of ancient Israel or due to Jewish customs in the time of Jesus, early Christians held the Ten Commandments in special regard. Around 180 c.e., the Christian theologian Irenaeus wrote that anyone who failed to observe the Decalogue would not receive salvation. IRENAEUS, IV AGAINST HERESIES 15:1, *available at* http://www.columbia.edu/cu/augustine/arch/irenaeus/ (last visited Dec. 9, 2004). Irenaeus justified Christians' veneration of the Decalogue over the other, "Jewish" laws of Moses by identifying the Decalogue with the "natural law" that God had written on *every* human heart at creation. *Id.* God originally intended to give *only* the Decalogue to Israel and "did then demand nothing more of them." *Id.* But after the Israelites worshipped the Golden Calf, *see Exodus* 32:1-10, God issued the remaining Mosaic laws to correct their waywardness: "The laws of bondage . . . were one by one promulgated to the people by Moses, suited for their instruction or for their punishment." IV IRENAEUS 16:5.

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[4] For example, the Gospel of Mark advocates abolishing the Jewish dietary laws (*kashrut*) on the ground that Jesus "declared all foods clean." *Mark* 7:19. The Gospel of Matthew argues precisely the opposite, portraying Jesus as instructing:

> Do not think that I have come to abolish the law or the prophets, I have not come to abolish but to fulfill. . . . Therefore, who ever breaks one of the least of these commandments, and teaches others to do the same, will be called least in the kingdom of heaven; but whoever does them and teaches them will be called great in the kingdom of heaven.

Matthew 5:17, 19. Acts of the Apostles adopts a middle ground, teaching that Christians should follow simple food laws (resembling the Noahide commands) so that Jewish and Gentile Christians could share common meals. *Acts* 15:20, 29.

Thus, Mosaic law beyond the Decalogue was not meant for Christians but only for the sinful Jews. In contrast, Jesus had spoken "to all alike the words of the Decalogue; and therefore, in like manner, do they remain permanently with us," *id.* 16:4; *see also Matthew* 19:16-22 (quoting Jesus: "If you wish to enter into life, keep the commandments."). Christians were to obey the Ten Commandments not because they were announced on Mount Sinai – which would legitimate all Mosaic law – but because, as restated by Jesus, they reflected universal natural law. The third-century theologian Origen characterized Mosaic law as an outmoded relic of the divinely cursed Jews.[5] *See* ORIGEN, IV CONTRA CELSUM § 22 (Henry Chadwick trans., Cambridge Univ. Press 1980) ("[Because of the crucifixion the] Jewish nation had to be overthrown, and God's invitation to blessedness transferred to others, I mean the Christians, to whom came the teaching about the simple and pure worship of God. And they received new laws which fit in with the order established everywhere."). Christians, not the Jews, were now the covenanted people of God, and they did not need to obey the Jewish Law of Moses but only the universal Law of Christ.

This linkage between the Decalogue and natural law remains a staple of Christian thought, *see, e.g.*, U.S. CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH § 2070, at 502-03 (1994) ("The Decalogue contains a privileged expression of the natural law . . . .") (citing IV IRENAEUS 15:1), and speaks to the unusual role of the Decalogue in the history of Jewish-Christian polemics and religious belief.

C. Jews Responded to the Rise of Christianity, in Part, by Emphasizing the Decalogue as Only One Aspect of Their Larger, Unique Covenant with God.

Before the rise of Christianity, Jews maintained the special status of the Decalogue: The *Mishnah* describes

[5] The belief that Jews were divinely cursed persisted until after the Nazi Holocaust.

the reading of the Decalogue as part of Temple morning prayer. *See Tamid* V.1. But when Jews were confronted by the natural law theories of the increasingly influential Christian Church, they responded by moderating the Decalogue's preeminence. Thus, the Jerusalem Talmud (circa 350 c.e.) states that Jews no longer recite the Ten Commandments "[b]ecause of the ill-will of the *Minim* ['heretics' or 'apostates']. It became necessary to deny their claim that these Ten were all that were given to Moses at Mount Sinai." Jerusalem Talmud (*Talmud Yerushalmi*), *Berachot* 1:5. Likewise, the Babylonian Talmud (circa 500 c.e.) states that "the practice had long been given up because of the misrepresentations of the *Minim*." Babylonian Talmud (*Talmud Bavli*), *Berachot* 12a. The Rabbi Shlomo Yitzchaki (1040-1105), known as Rashi, explained the purpose of this text as follows: "To prevent them [the disciples of Jesus] from telling the unlearned that the rest of the Torah is untrue; and arguing that only what God spoke at Sinai [as opposed to what was spoken by Moses] should be read to the people." Ezra Zion Melammed, *"Observe" and "Remember" Spoken in One Utterance*, *in* THE TEN COMMANDMENTS IN HISTORY AND TRADITION at 191, 212.

A century after Rashi, Rabbi Joseph Kimhi wrote another defensive tract to counter the efforts of baptized Jews to convert their former co-religionists. Here again, the Decalogue was a focal point of contention. Rabbi Kimhi argued that the Torah – not just the Decalogue but the whole of Mosaic law – was God's *entire* revelation, not to be augmented with the Christian New Testament. Nor could any of the Torah's commands be expunged:

> [The two tablets] were inscribed on both sides so that the Gentiles and all the nations which were to follow could not say that God had not completed His work, having left one side of the tablets empty so that He might write other laws and a new Torah. [The writing] was engraved on the tablets so that it could not be erased and so that they could not say that their baptismal waters which were to come could erase the writing in the holy Torah of Moses. They were inscribed on

> both sides *in the same language* and in a *few words* to teach with completeness, wisdom, and knowledge. One may not add to the Torah nor take anything away.

JOSEPH KIMHI, THE BOOK OF THE COVENANT 69-70 (Frank Talmage trans., 1972) (second alteration in original) (footnotes omitted). Thus, from Late Antiquity on, Jews stressed that the Ten Commandments were not categorically different from the other commandments that God had given to Moses on Mount Sinai. All 613 *mitzvot,* i.e., religious commandments, had the same authority behind them, and all were to be obeyed to the full extent possible. All were God's special gift to the people of Israel and *only* the people of Israel – and non-Jews were not expected to observe them.

As a result, by medieval times the Ten Commandments had become emblematic of the religious rivalry between Rabbinic Judaism and Christianity – a rivalry made all the more intense because the two traditions defined themselves in direct opposition to each other. Christians maintained observance of the Ten Commandments despite their dismissal of most of Mosaic Law, primarily because of the Christian equation of the Decalogue with natural law. Jews observed the Decalogue as a distinctive, though not unique, component of the entire Torah, given by God exclusively to the people of Israel. Further, Jews and Christians interpreted the commandments differently, particularly the commandment to observe the Sabbath and the prohibition against images of the divine. Jews frowned upon Christians' celebration of the Sabbath on the wrong day, and saw Christian statues, icons, and paintings as forms of idolatry – all evidence that Christians did not, in fact, keep all Ten Commandments. The Decalogue has played a singular role in the relations between Judaism and Christianity and serves a distinct religious role for each faith, which cannot be secularized by government fiat or the placement of the Decalogue among other secular symbols.

D. Christians and Jews Used the Decalogue as a Symbol for Judaism – but with Very Different Meanings.

The iconic dimension of the Decalogue is further evident in its use as both a Christian and Jewish symbol for Judaism. In medieval times, Christians began to use the two tablets as a symbol for Judaism. Around 1225 c.e., King Henry III required all English Jews to wear on their chests "'the shape of two white tablets made either of linen or of parchment.'" Gad B. Sarfatti, *The Tablets of the Law as a Symbol of Judaism* [hereinafter "Sarfatti"], *in* THE TEN COMMANDMENTS IN HISTORY AND TRADITION at 383, 403 (quoting D'BLOSSIERS TOVEY, ANGLIA JUDAICA, OR, THE HISTORY AND ANTIQUITIES OF THE JEWS IN ENGLAND 79 (Oxford 1738)). In 1275, his successor Edward I further specified that all Jews were to wear "'a badge of yellow cloth in the shape of two tablets, six fingers long, and three fingers wide.'" *Id.* (quoting TOVEY at 202, 205). The majority thus could identify dissenters with ease.

Similarly, a frequent motif in late medieval Christian art was the contrast between the feminine figures of Ecclesia (Church) and Synagoga (Synagogue). *See* HEINZ SCHRECKENBERG, THE JEWS IN CHRISTIAN ART: AN ILLUSTRATED HISTORY 31-74 (John Bowden trans., 1996). Typically, Ecclesia stands proud and erect, regally crowned and holding a Eucharistic chalice in one hand and a triumphant banner in the other. Synagoga, by contrast, is slumped and defeated with a crown falling off her head, and often blindfolded because she fails to see the truth of the Gospel. Synagoga holds in one hand a broken staff, and falling from her other hand is either a torn Torah scroll or the inverted tablets of the Decalogue. *See* illustration, in attached Appendix at 2a. The inverted Decalogue symbolized the Jews' displacement by the Christian church.

In the fifteenth century, Jews began to use the Decalogue as a positive symbol of their own on ornate synagogue Arks used to keep the Torah scrolls. This was a natural association of the synagogue Ark with the biblical Ark of the Covenant, which stored the actual tablets of the

Decalogue. For Jews, the tablets served both to counter the Christian symbol of the cross and to assert the divine origins of the Law. The tablets gradually became a standard symbolic feature in synagogue ornamentation. *See* Sarfatti at 417-18.

The arrangement of the Ten Commandments was also significant. Jewish depictions usually followed the organization given in rabbinic literature, with two tablets each containing five Commandments (the first being "I the Lord am your God . . . ," understood to command belief in the God who freed Israel). Christians typically followed the pattern established by Augustine, placing the first three commandments dealing with obligations toward God on the first tablet and the remaining seven dealing only with human obligations on the second. These arrangements reflect not only different enumeration of the Commandments, *see* Appendix at 1a, but also the different theological emphases of the two traditions. As a result, any visual arrangement of the Decalogue will necessarily reflect: (1) a Jewish theological construction of the Ten Commandments in tablet form; (2) a Christian theological construction of the same; or (3) presented in some other form, a disregard of the distinct understandings of the Decalogue held by Jews and Christians.

E. The Concept of the "Judeo-Christian Tradition" Is a Recent Protestant Innovation that Masks This Historic Tension, Especially with Regard to the Decalogue.

The concept of a "Judeo-Christian tradition" often arises in Establishment Clause cases. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (holding that it is not government's task to promote nonsectarian, Judeo-Christian prayer in context of public school graduations); *Marsh v. Chambers*, 463 U.S. 783, 793 (1983) (upholding solemnizing legislative prayers offered "in the Judeo-Christian tradition"). Given the history of tension between these faiths – with Christians until the twentieth century denying the continuing validity of Judaism, and Jews

seeking to preserve their religious convictions and practices against the rise of a Christian majority – it should come as no surprise that the emergence of this common "tradition" is a relatively recent development. Further, the concept is itself a sectarian creation; rather than elevate the status of minority Jewish and Catholic traditions, it subordinates them to a generally Protestant belief system – a phenomenon particularly evident in the context of displays of the Ten Commandments such as those before this Court.

The term "Judeo-Christian" first appeared in 1899 as a reference to Christianity's roots in biblical Israel. *See* Mark Silk, *Notes on the Judeo-Christian Tradition in America*, 36 AM. Q. 65, 65-66 (1984). As a term used to denote common values shared by Jews and Christians, it became popular in the United States as a slogan against both fascist anti-Semitism and atheistic communism. Some Jews welcomed the expression as an indication of their full participation in American life, but others warned that the concept, however well-intentioned, threatened to absorb Jews' distinctive identity into a generic American Protestant "civil religion." For similar reasons, American Catholics did not embrace the term, and the "Judeo-Christian tradition" remained largely a Protestant phenomenon. *See id.* at 69-79.

Indeed, Protestant thinkers such as Reinhold Niebuhr and Paul Tillich advocated a concept of the Judeo-Christian tradition that, notwithstanding its apparent inclusiveness, incorporated various aspects of the historical struggle between Jews and Christians and between Protestants and Catholics. As noted above, Christians long minimized the legal authority of the Torah. Protestant thinkers instead emphasized the prophets as the critical commonality between Jews and Christians, thereby continuing the Christian preference for the prophetic books of the Old Testament as pointing to the coming of Christ.[6]

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[6] This Christian preference for the prophets over the Torah (known to Christians by its Greek name, the Pentateuch), is reflected in the practices of those churches that use a common lectionary for readings

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Thus, Niebuhr wrote that "'I have, . . . as a Christian theologian, sought to strengthen the Hebraic-prophetic content of the Christian tradition,'" *id.* at 71 (quoting Reinhold Niebuhr, *Introduction* to WALDO FRANK, THE JEW IN OUR DAY at 3, 4 (1944)), while Tillich argued that Christianity was "'always in danger of losing her prophetic spirit'" and therefore needed "'the prophetic spirit included in the traditions of the synagogue,'" *id.* at 71-72 (quoting unpublished Tillich manuscript quoted in A. ROY ECKHARDT, CHRISTIANITY AND THE CHILDREN OF ISRAEL 146-47 (1949)). Niebuhr in particular saw the Hebrew prophets as brothers in arms in combating the teachings of the Catholic Church, which, by proclaiming the pope as the vicar of Christ on earth, was "'inferior to Hebraic prophetism in failing to observe a proper distinction between the divine and the human.'" *Id.* at 77 (quoting REINHOLD NIEBUHR, THE SELF AND THE DRAMAS OF HISTORY 103 (1955)).

Catholics and Jews alike opposed this Protestant construction of the "Judeo-Christian tradition." One Jesuit theologian, John Courtney Murray, responded that Protestantism, Catholicism, and Judaism were "'radically different'" religious traditions, none of which "'is reducible, or perhaps even comparable, to any of the others.'" *Id.* at 77 (quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 138 (1960)). Their co-existence in American society was possible, not because of any common lineage, but because of "'the articles of peace which are the religion-clauses of the First Amendment.'" *Id.* (quoting MURRAY at 125). For their part, Jews concerned about maintaining traditional teachings and practices saw the "Judeo-Christian tradition" as another instance of Christians supplanting the Torah, their most authoritative biblical texts, by exalting the prophets. Thus, Jewish scholar Bernard Heller praised Tillich's love of "'the prophetic spirit included in the tradition of the Synagogue,'" but he

during worship. Readings from the prophetic books outnumber readings from the Pentateuch by a margin of approximately three to one.

stressed the difference between the centrality of Christ for Christians and of the Torah for Jews and refused "'to accept the kiss of death'" that the "Judeo-Christian tradition" represented for Judaism. *Id.* at 78-79 (quoting Bernard Heller, *About the Judeo-Christian Tradition*, 1 JUDAISM 257, 260-61 (1952)).

As a result, while the concept of a "Judeo-Christian tradition" represents a commendable effort to be inclusive, it masks an assimilation of minority Jewish and Catholic religious practices into the general American Protestant ethos, and a disregard for the views of those who are not Protestant, Catholic, or Jewish. Seen in this light, government efforts to present the Ten Commandments in a "nonsectarian" or "Judeo-Christian" form obscure the distinctive Jewish and Christian understandings of their significance. Attempts to make the Decalogue both Jewish (reflecting God's unique covenant with the Israelites) and Christian (adopting a universal natural law divorced from other Jewish law) yield instead a Decalogue that is neither. Moreover, this Decalogue would plainly stand apart from other religions (such as Islam) and alienate those with no religious belief. *See Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting) (using a crèche in "a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence" is "a misuse of a sacred symbol").

III. The Texas and Kentucky Displays Exemplify the Tensions Between the Jewish and Christian Traditions and Demonstrate How Displays of the Decalogue Violate the Establishment Clause.

In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the Court summarized its Establishment Clause jurisprudence by noting that, "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *Id.* at 592 (citing *Engel v. Vitale*, 370 U.S. 421,

436 (1962)). The crucial question, therefore, is whether a display of the Decalogue reflects the state's desire to promote or disfavor a religious viewpoint, either in actuality or as perceived by a reasonable observer:

> Whether the key word is "endorsement," "favoritism" or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

Id. at 593-94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)); *see also id.* at 630-31 (O'Connor, J., concurring in part and concurring in the judgment) (noting that reasonable observer in endorsement inquiry is presumed to be familiar with the community and the history of the practice at issue).

The history of the Decalogue as both a religious text and a lightning rod in theological disputes between Judaism and Christianity supplies the answer to the question before the Court: The governmental displays of the Ten Commandments in Texas and Kentucky violate the Establishment Clause. When the state erects a monumental or framed rendition of this sacred text, with a particular selection and arrangement of text and symbolism divorced from a program of study and dialogue, it inevitably creates the appearance that government has endorsed – or demeaned – at least one form of religious belief.

A. The Ten Commandments Are Inherently Religious, and by Displaying a Single Version of Them, These Displays Send a Religious Message.

The Decalogue is not only largely religious in its words, but – like any familiar prayer – it is inherently associated with religion. Indeed, the Ten Commandments fall at the core of religion. For many Jews, they symbolize the very word of God and His unique covenant with the Jewish

people. For Christians, they are the text of universal natural law, restated by Jesus and removed from their original context at Mt. Sinai – and thus, until very recently, they also symbolized Christianity's rejection of Judaism and Jewish law more generally. For Muslims, the Decalogue has quite a different meaning, for its particular words and the symbol of the tablets represent a corrupted or inferior expression of divine revelation. And over time Judaism and Christianity have alternatively encouraged or suppressed public recitation or veneration of the Commandments, and used them as religious symbolism, with those choices having very different meanings for each religion.

Thus, the Decalogue *is* religious speech, religious identity, and religious symbolism. But it is *not* symbolic of *all* religions in some generic sense, as no static, public display of a single interpretation of the Decalogue could carry that weight. That task is all the more complicated because there is no generalized "Judeo-Christian" notion of the Ten Commandments acceptable to Jews and Christians. Even if Judaism and Christianity were the *only* religious influences on Western thought, a display of the Decalogue simply could not be all things to all people.

The Texas and Kentucky displays illustrate the dilemma in trying to create a generic celebration of the Decalogue. As described in numerous appellate decisions, the Texas monument arose as part of a wide-ranging effort to use a purportedly "nonsectarian" version of the Ten Commandments to teach American youth a common code of conduct. *See, e.g.*, *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 294-95 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001). Yet, the Texas monument contains two small Stars of David *and* the superimposed Greek letters Chi and Rho, a symbol for Christ. *See Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003).[7] This juxtaposition in a government display is troubling, especially for Jews who would object to

[7] There are no symbols representing other religious traditions on the monument – nor could there be, for no other traditions regard the Decalogue as authoritative.

any Jewish symbols appearing alongside a symbol designating Jesus as the Messiah and under a Christian translation of only ten of the 613 Mosaic commands. As for the Commandments themselves, the Texas monument depicts two small tablets containing a Hebrew version of the Decalogue, with the Commandments evenly divided between the tablets as in the Jewish tradition. *See supra* Section II.D. But as its primary presentation of the Decalogue, the monument contains an abbreviated, unnumbered English version of the commandments in a single column, taken from the Protestant King James Bible.[8] While the designers sought to be inclusive on the numbering and organization of the commandments, no arrangement of the commands will alter the implication of the first words, "I am the Lord your God," for Jewish viewers. Jews view this as a reference to God, who freed them from slavery in Egypt and who commands as part of the Sinai covenant. Its presentation on the monument alongside Christian symbolism appears to signify that the Sinai covenant includes non-Jews or that the Decalogue is severable from the rest of the covenant – neither of which is acceptable in the Jewish tradition.

The Texas monument exemplifies the problems of the "Judeo-Christian" ethic, at least as applied to the Decalogue. By adopting an apparent "Judeo-Christian" interpretation of the Ten Commandments, the monuments appear to endorse these faiths over other religious beliefs or the absence of any belief – the monument is "nonsectarian" only if one forgets, for the moment, about sects other than Judaism or Christianity. *See County of Allegheny*, 492 U.S. at 615 ("The simultaneous endorsement of Judaism or Christianity is no less constitutionally infirm than the endorsement of Christianity alone.") (opinion of Blackmun, J.). It thus communicates an exclusionary message prohibited by the Establishment Clause. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)

[8] The King James translation differs noticeably from the Catholic translation in use when the monument was erected, yet the designers apparently hoped that this text would be acceptable to Protestants and Catholics alike.

("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."). At the same time, attempting to homogenize the Decalogue's defining characteristics for Jews and Christians distorts these fundamental aspects of religious identity. *See id.* at 727 (Blackmun, J., dissenting) (noting that use of a crèche in "a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence" is "a misuse of a sacred symbol"). Finally, even if a "Judeo-Christian" slant on the Decalogue were historically or theologically justified, it is not the state's place to promote that interpretation:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

Lee v. Weisman, 505 U.S. 577, 589 (1992).

The courthouse displays in McCreary and Pulaski Counties, Kentucky, present the other horn of the dilemma; rather than homogenize the Jewish and Christian interpretations of the Decalogue, these counties simply adopted a particular Christian version. The displays use the King James translation of Exodus, thereby appearing to prefer that Protestant text to either the Jewish or Catholic translations. *See ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 443 n.2 (6th Cir. 2003). Further, and of great religious significance, the displays leave out the prefatory statement "I am the Lord your God," *see id.*, omitting what is, for the Jew, perhaps the single most important statement in the entire Decalogue, *see supra* Section II.A. From that perspective, the display represents the counties' rejection of the true meaning of the Decalogue as part of

God's unique covenant with Israel. Even if that was unintentional, the effect is a demeaning caricature of a sacred text. Either message is constitutionally infirm.

B. The Historical Importance of the Decalogue Does Not Justify the Displays that Are Before the Court.

The State of Texas and McCreary and Pulaski Counties, Kentucky, justified their displays by invoking the historical, secular importance of the Ten Commandments. *See McCreary*, 354 F.3d at 446-47; *Van Orden*, 351 F.3d at 177. But the Texas monument itself conveys no such message, while the Kentucky displays contain no discussion of the Decalogue other than the bald assertions that it has "profoundly influenced the formation of Western legal thought and the formation of our country" and provides "the moral background of the Declaration of Independence and the foundation of our legal tradition." *McCreary*, 354 F.3d at 443. Moreover, even accepting these statements of secular purpose, the historical significance of the Decalogue does not outweigh the religious messages conveyed by the displays.

Undoubtedly, the Decalogue is of historical importance – but then so is much in religion. The Decalogue's general familiarity to most inhabitants of our Nation does not mean that the state can safely assume that a viewer of its display perceives it *ipso facto* as purely a "historical document" or as an "educational" exhibit about the development of Western culture or Western law. Here, the displays lacked any such historical or educational context.[9] They thus differ from other displays of the Commandments that are presented in a clearly secular manner:

> [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate .... Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers.

County of Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part).

The Decalogue, even in just one of its forms, unquestionably *could* be included in a public high school course as part of a properly planned curriculum on historical texts. But it would defy logic and common sense to conclude here that the monumental display of the Decalogue in a particular form on the grounds of a state capitol, or framed on the wall of a county's halls of justice, has only an educational meaning. Indeed, in the Kentucky case, it is hard to imagine the curator of a display presented solely for secular study to be as devoted as the county employees were here to modifying the display repeatedly to satisfy judicial scrutiny. Remarkably, in all the changes that were made, Kentucky's adopted version of the Decalogue never changed, in all instances maintaining its steadfast adherence to a particular understanding of the Decalogue, in the very halls where litigants – both Christian and non-Christian, religious and non-religious – walk to find redress for discrimination or vindication from the state's accusations of wrongdoing. As for the Texas monument, it is permanent in its features and not part of any curator's secular effort to educate about the topic of religion.

While in some contexts, an "explanatory plaque" may confirm that a public display of a religious symbol does not represent the government's sponsorship of religious beliefs, *see id.* at 619 (opinion of Blackmun, J.), in light of the contentious religious history of the Decalogue and the central role it plays in Judaism and Christianity, only a substantial educational discourse on the religious, historical

[9] For example, there would be no constitutional problem with a Utah state capitol monument depicting Brigham Young and other Mormons traveling to the territory to establish their home, as a depiction of that state's history.

and ethical relationship between the Ten Commandments and the development of American law and mores would be sufficient to present the Decalogue in a way that avoids a message of government endorsement. Certainly the mere display of the Decalogue in proximity of other secular symbols is not enough to secularize this deeply religious symbol. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (contrasting the use of the Decalogue in a school curriculum with its mere posting on a school wall). But Texas and Kentucky chose instead to erect a single, static, enduring display, leaving the viewer to perceive nothing but an impermissible religious message.

C. The Ten Commandments Are Not Part of Any "Ceremonial Deism," Nor Should They Be.

At various times, this Court and individual Justices have recognized that some government conduct that might formally be considered religious does not implicate the Establishment Clause because it poses no significant threat of establishing a state religion or has, over time, lost its religious meaning. *See Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (holding that 200-year practice of opening Congress with prayer poses no threat to religious freedom); *Lynch*, 465 U.S. at 676 (noting the use of "In God We Trust" as the national motto and "One Nation under God" in the Pledge of Allegiance); *id.* at 716 (Brennan, J., dissenting) (noting that religious references in Pledge of Allegiance and motto should be "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2326 (2004) (O'Connor, J., concurring in the judgment) (describing "under God" in Pledge as a "highly circumscribed reference to God" and "tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system"). Whatever the legal or cultural merits of "ceremonial deism" such as that exhibited in legislative prayer or the national motto, displays of the Decalogue plainly do not invoke that concept. As the history

of the Decalogue makes abundantly clear, the Ten Commandments implicate fundamental questions of religious identity – for the Jew, his identity as a member of God's chosen people; and for the Christian, her adherence to natural laws that Jesus Christ restated for all humanity. As this Court has rightly recognized, "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths." *Stone*, 449 U.S. at 41.

While Jews and Christians interpret the Decalogue differently, they would certainly share a common revulsion at the idea that its display should be exempt from the Establishment Clause because the Commandments have lost their religious content. Indeed, that "finding" as if it were a matter of judicial notice would be a constitutional and theological outrage, for Jews and Christians generally, and no doubt for the proponents of the Texas and Kentucky displays. As the Court recognized in *Engel v. Vitale*, 370 U.S. 421 (1962), the Establishment Clause exists not only to protect the vitality of the state, but also that of the church:

> [The Establishment Clause's] first and most immediate purpose rested on a belief that *a union of government and religion tends* to destroy government and *to degrade religion*. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support for government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.

Id. at 431-32 (footnotes and citations omitted) (emphasis added).

In addition to alienating nonbelievers, Jews, Christians, Muslims, Hindus and others alike, the Texas and Kentucky displays are likely to have precisely this degrading effect: In Texas, by homogenizing the Jewish and Christian interpretations of the Decalogue into a watered-down version satisfying to neither group, and in Kentucky, by blanketly asserting, with no evidentiary support, some fundamental connection between the King James text of the Commandments and American democracy. It would be ironic – and most unwelcome from the perspective of *amici* – if upholding these displays contributed to devaluing a sacred text dear to many of this country's faithful.

* * *

Twenty-four years ago, in *Stone v. Graham*, this Court recognized that the Constitution placed limits on the government display of the Ten Commandments, because the Decalogue is "undeniably a sacred text in the Jewish and Christian traditions" and thus the purpose of a statute requiring its posting in public classrooms was "plainly religious in nature." *Stone*, 449 U.S. at 41. While venerating the Commandments might be desirable "as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Id.* at 42. The Court's subsequent elaboration of the "endorsement" inquiry under the Establishment Clause, and history's demonstration of the impossibility of posting a universally acceptable or "generic" version of the Decalogue, confirm that *Stone* was rightly decided. The Ten Commandments are inherently religious, and the state cannot present a single interpretation of them in a static display without necessarily endorsing or denigrating at least one religious view. In their current form, the Texas and Kentucky displays violate the Establishment Clause.

CONCLUSION

In No. 03-1500, the Court should reverse the judgment of the court of appeals. In No. 03-1693, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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December 13, 2004

Various Ways of Numbering the Decalogue (Exodus 20:2-17 (RSV))[1]

Abbreviated Commandments by verse no.	Jewish	Augustine (5th Century)	Roman Catholic, Lutheran	Reformed Christian	Orthodox Christian	Josephus (1st Century)	Philo (1st Century)
2. I am the Lord your God, who brought you out of the land of Egypt, etc.	1	-	-	1	-	-	-
3. You shall have no other gods before me.	2	1	1	1	1	1	1
4-6. You shall not make yourself a graven image, or any likeness of anything, etc.	2	1	(omitted or included in 1)	2	2	2	2
7. You shall not take the name of the Lord your God in vain, etc.	3	2	2	3	3	3	3
8-11. Remember the Sabbath day, to keep it holy, etc.	4	3	3	4	4	4	4
12. Honor your father and your mother, etc.	5	4	4	5	5	5	5
13. You shall not kill.[2]	6	5	5	6	6	6	7
14. You shall not commit adultery.	7	6	6	7	7	7	6
15. You shall not steal.	8	7	7	8	8	8	8
16. You shall not bear false witness against your neighbor.	9	8	8	9	9	9	9
17a. You shall not covet your neighbor's house.	10	9 (wife)	9	10	10	10	10
17b. You shall not covet your neighbor's wife, etc.	10	10 (rest of *Dt.* 5:21)	10	10	10	10	10

[1] Adapted from WALTER J. HARRELSON, THE TEN COMMANDMENTS AND HUMAN RIGHTS 40 (rev. ed. 1997). Some textual differences result from the use of the Deuteronomic text rather than the Exodus text.

[2] In the Jewish tradition, this Commandment unambiguously prohibits murder, or illegal killing (in Hebrew, *ratzach*), while Christian translations often construe the Commandment more broadly to prohibit all killing.

Illustration

Images of Ecclesia and Synagoga on the west portal of the Liebfrauen-kirche in Trier, Germany, dating to approximately 1250 c.e, taken from HEINZ SCHRECKENBERG, THE JEWS IN CHRISTIAN ART: AN ILLUSTRATED HISTORY 50 (John Bowden trans., 1996). Note the inverted Tablets of the Decalogue in Synagoga's hand.

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- Jesus, the Christ (team-taught)
- The Johannine Writings
- The Jewish-Christian Encounter
- The Prophets
- The Christian Scriptures and Jewish-Christian Relations

Graduate

- The Torah: The Teaching of the Lord *
- The Prophets: Consciences of the Covenant *
- The Writings: Treasury of Religious Thought
- Letters of Paul: Conversations in the Earliest Churches *
- Synoptic Gospels: Expressions of Dynamic Faith *
- Gospel of John: Reinterpreting the Jesus Tradition *
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- Interfaith Study Tour to Israel: Finding Our Roots Together
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- Directing Religious Education Programs
- The Christ of Faith (team-taught)
- The Church Through the Ages (team-taught)
- The Triune God: The Relational Nature of the Divine (team-taught)
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Publications

Books:

- *Walking God's Paths: Christians and Jews in Candid Conversation* – Video series (United States Conference of Catholic Bishops: Catholic Communications Campaign and The National Council of Synagogues, 2004) and Users' Guide. (www.bc.edu/wgp, 2003).
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Jewish-Christian relations published online at: http://www.bc.edu./bc_org/research/cjl/documents.html

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- "Education for Religious Particularism and Pluralism: Theological Perspectives," annual meeting of the Association of Professors and Researchers in Religious Education, Toronto, Canada, October 16, 1999.
- "Reflections on Religious Pluralism as Regards Roman Catholicism" for the Education for Religious Particularism and Pluralism project, sponsored by the Lilly Endowment's Valparaiso Project on the Education and Formation of People in Faith, May 2, 1999, White Plains, NY.
- "Toward Educational Guidelines: Colleges, Universities, and Seminaries" (with Ruth Langer) at *Teaching About the Shoah*, co-sponsored in February 1999 by the Archdiocese of Baltimore, the American Jewish Committee, and the National Conference of Catholic Bishops. This text became the basis for guidelines issued in 2001 by the Secretariat for Ecumenical and Interreligious Affairs, N.C.C.B. entitled, *Catholic Teaching the Shoah: Implementing the Holy See's* We Remember.
- "How Does the Unique Relationship Between Judaism and Christianity Impact the Effort to Educate for Both Particularism and Pluralism?" for the Education for Religious Particularism and Pluralism project, sponsored by the Lilly Endowment's Valparaiso Project on the Education and Formation of People in Faith, May 4, 1998, White Plains, NY.
- "Jews and Judaism in U.S. Catholic Religious Education," a paper and multimedia program presented at the 16th meeting of the International Catholic-Jewish Liaison Committee, March 23-26, 1998, Vatican City.
- Testamental Terminology," for the Continuing Seminar on Biblical Issues in Jewish-Christian Relations, Annual Meeting of the Catholic Biblical Association of America, August 12, 1997, Seattle, WA.

- "Romans 9-11 and the Modern Jewish and Catholic Dialogue: An Experiment Using the Hermeneutics of Sandra Schneiders," Meeting of the Catholic Biblical Association, Aug 13, 1995, Loudonville, NY.

Professional Memberships

- The Catholic Biblical Association of America
- The Christian Scholars Group on Christian-Jewish Relations
- Advisory Committee on Catholic-Jewish Relations for the Secretariat for Ecumenical and Interreligious Affairs of the U.S. Conference of Catholic Bishops
- Advisory Council of Relation and Encounter, the interfaith initiative of the Sisters of Our Lady of Sion, USA/Canada
- The Jewish-Christian Interfaith Partnership of New Hampshire (1992-)
- Board of Directors, NH Conference of Religious Educators (1991-2000)
- Board of Directors, The New Hampshire Bible Society (1994-2000)
- Christian-Jewish Dialogue of Massachusetts Council of Churches (2000-)

Professional Activities

- Invited to prepare paper for consultation of the International Council of Christians and Jews and World Council of Churches, London, England, December 9-10, 2004; topic: "Primary Themes in Catholic Documents on Jews and Judaism."
- Invited writer for a revision of *Within Context: Jews and Judaism in Catholic Teaching Materials,* co-sponsored by the Anti-Defamation League and the Bishops Committee on Ecumenical and Interreligious Affairs, USCCB, Nov. 2001 to the present.

- Invited participant in a consulation on the Pontifical Biblical Commission's study *The Jewish People and Their Sacred Scriptures in the Christian Bible* sponsored by the Pope John Paul II Intercultural Center, Washington, D.C., Oct. 24, 2002.
- Invited participant in interfaith dialogue on the Pontifical Biblical Commission's study *The Jewish People and Their Sacred Scriptures in the Christian Bible* sponsored by the Rabbinic Committee for Interreligious Consultation, Washington, D.C., May 7, 2002.
- Invited to private consultation with Cardinal Walter Kasper on Catholic-Jewish Relations, Catholic Theological Union, Chicago, April 17, 2002.
- Authored address in commemoration of Yom Hashoah delivered by Most Rev. John McCormack, Bishop of Manchester, April 8, 2002.
- Acting Secretary for the Bishops' Committee on Ecumenical and Interreligious Affairs – National Council of Synagogues Consultation, March 2002 – May 2002.
- Secretary for organizational meeting of the Council of Center on Jewish-Christian Relations, New York City, October 28-29, 2001.
- Member of the delegation representing the Pontifical Commission for Religious Relations with the Jews at the 17th meeting of the International Catholic-Jewish Liaison Committee, New York, April 30-May 4, 2001.
- Invited consultant at "Jews and Christians in Conversation: A Cross-Generational Conference," Cambridge University, U.K., co-sponsored by the Centre for Jewish-Christian Relations at Cambridge University, the Cardinal Bernardin Center, Chicago, and the Tanenbaum Center for Interreligious Understanding, New York, March 25-27, 2001.
- At the request of the Vatican Secretariat of State, served in the Holy See's Delegation to "The Stockholm

International Forum on the Holocaust," Stockholm, Sweden, January 26-28, 2000.

- Co-Developer and consultant on Proposal for the Center for Christian-Jewish Learning at Boston College; 1997-2000.
- Member of the "Education for Religious Particularism and Pluralism" project, sponsored by the Lilly Endowment's Valparaiso Project on the Education and Formation of People in Faith, directed by Drs. Mary C. Boys and Sara Lee, 1997-2000.
- Manuscript reviewer, *Journal of Ecumenical Studies*, 1997-present.
- Co-Convener, with Dr. John Clabeaux, of the Continuing Seminar on Biblical Issues in Jewish-Christian Relations, Catholic Biblical Association of America, 1996-present.
- Designed and maintained World Wide Web site for The Ministry Institute, Notre Dame College, Manchester, NH, 1997-2000.
- Scholar-in-residence for biannual interfaith study-tours to Israel and Jordan, 1994, 1996, 1998; the latter trip included the posting of daily lectures, summaries, and photographs to the Shalom Center website for family members and interested persons back home.

Administrative Positions

- Director of The Ministry Institute, Notre Dame College, Manchester, NH, 1991-2000; Designed and directed Master of Arts in Theology program; oversaw ongoing formation of ministerial personnel including permanent deacons through the Ministry Foundations program, Weekend Workshops, and Theological Roundtables.
- Co-Director, with Rabbi Arthur Starr, of The Shalom Center for Understanding Between Christians and

Jews, Notre Dame College, Manchester, NH, 1994-1999; established center, organized conferences, workshops, and courses, led and lectured on interfaith study-tours to Israel and Jordan, and designed and edited a six-week curriculum for local interfaith dialogue, *Sharing Shalom*.

College Activities

- Member, Jesuit Institute Seminar on Jewish-Christian Relations, 2000-present
- Member, Boston College September 11 Response Committee, fall 2001.
- Chair, Faculty Development Committee, 1992-1995
- Member, Search Committee for Academic Vice-President, 1994
- Chair, College position paper on Ex Corde Ecclesiae, 1993-1994
- Chair, Ad Hoc Committee on Academic Computing, 1996-1997
- Member, Faculty Affairs Committee, 1996-present; member, sub-committee on faculty promotion.

Lectures for academic institutions, national agencies, or interfaith organizations

- Panelist-respondent to lectures by Raymond E. Brown entitled, "The Bible in Our Faith and Practice," 20th Anniversary of the Institute of Religious Education and Pastoral Ministry, Boston College, July 23-25, 1991.
- "An Overview of the Jewish and Christian Encounter," keynote launching the Jewish Christian Coalition of New Hampshire, sponsored by the NH Council of Churches and NH Jewish Congregations, May 27, 1992.

- "The Catholic Perspective on Jews and Judaism as Seen in Catholic School Curricula," panelist, the Second Annual Salzberg Conference on Anti-Semitism, Brandeis University, Waltham, MA, November 6, 1992.
- "The Dead Sea Scrolls," daylong workshop, Notre Dame College, Manchester, NH, October 30, 1993.
- "Romans 9-11 and Modern Jewish-Catholic Relations," public interfaith dialogue with Rabbi Leon Klenicki, Notre Dame College, Manchester, NH, March 14, 1994.
- "The *Catechism of the Catholic Church*: First Impressions," theological roundtable, Notre Dame College, Manchester, NH, October 22, 1994.
- "The Portrayal of Jews and Judaism in Christian Educational Materials," "Introduction to Interfaith Dialogue," panelist; and "How Are We Similar? How Are We Different? Where Do We Meet?" panelist; National Workshop on Christian-Jewish Relations, Tulsa, OK, Nov. 5-9, 1994.
- "Jews and Judaism in the *Catechism of the Catholic Church*," Catholic-Jewish Relations Committee of the Archdiocese of Boston, Newton, MA, December 12, 1994.
- "The Origins of Anti-Jewish speech in the New Testament" at the 30th Anniversary Celebration of *Nostra Aetate* co-sponsored by the Archdiocese of Atlanta and the American Jewish Committee, Atlanta chapter, Atlanta, Georgia, June 20, 1995.
- "Thirty Years Since Nostra Aetate," a public interfaith dialogue with Rabbi Leon Klenicki, Diocese of Norwich, Norwich, CT, Dec. 3, 1995.
- "Christian-Jewish Relations in the Late 20th Century," Ecumenical Institute of New England, Peterborough, NH, May 17, 1996.
- "How Local Centers for Christian-Jewish Understanding Began and Developed," panelist, also responded to paper read by Dr. Michael Kogan entitled, "Affirming

the Other's Theology: How Far Can Jews and Christians Go?" 15th National Workshop on Christian-Jewish Relations, Stamford, CT, October 27-30, 1996,

- "Paul and the Law of Moses," at *The Apostle Paul: His Message for Today* conference, NH Bible Society and Notre Dame College, Manchester, NH, November 16, 1996.
- "Proclaiming Shalom: Building Bridges and Avoiding Pitfalls When Referring to Jews and Judaism in Christian Worship," Center for the Study of Jewish-Christian Relations, Merrimack College, North Andover, MA, Mar. 12, 1997.
- "Catholic Religious Education on Jews and Judaism," multimedia presentation at an interfaith consultation on *Teaching About the Other* sponsored jointly by the Interreligious Coordinating Council of Israel, the National Council of Synagogues, and the National Conference of Catholic Bishops, New York City, NY, March 18, 1997.
- "Challenges of Implementation," multimedia presentation, conference on *Faith for the Future: The Practical Implications of Teaching and Preaching in the Light of the Jewish-Christian Encounter*, The Institute for Christian and Jewish Studies, Baltimore, MD, May 14, 1997.
- "The Life and Death of Jesus: New Insights into His Historical and Social Context," multimedia presentations at *The Scriptures and the Scrolls* conference, NH Bible Society and Notre Dame College, Manchester, NH, November 7-8, 1997.
- "The Advent Lectionary and Its Use of the Scriptures of Ancient Israel," multimedia presentation, Stonehill College, North Easton, MA, November 12, 1997.
- "Is the Christian Bible Anti-Semitic?", multimedia presentation, Stonehill College, North Easton, MA, November 12, 1997.

- "What is the Teaching of Contempt?;" "A Renunciation that Transforms;" "Religion Textbooks on Jews and Judaism;" and "Jews and Judaism in the Lectionary," four multimedia presentations, *Beyond the Teaching of Contempt: Practical Resources for the Church* conference, Andover Newton Theological School, Newton, MA, January 28, 1998.
- "Catholic Religious Education on Jews and Judaism," multimedia presentation, Connecticut Council of Churches and Synagogues, Stamford, CT., March 8, 1998.
- "The Vatican and the Jews," daylong multimedia workshop, Notre Dame College, April 17, 1998.
- "The Vatican's 1998 Statement on the Holocaust," The Center for the Study of Religion in Public Life, Trinity College, Hartford, CT, May 6, 1998.
- "The Importance of Historical Jesus Research for Jewish-Christian Relations – A Catholic Perspective," multimedia presentation, The Center for Christian-Jewish Dialogue, Colorado Springs, CO, May 17-18, 1998.
- "The Renewal in Relations Between Christians and Jews and Its Contribution to Global Interreligious Understanding," Nashua Area Interfaith Council, Cathedral of the Pines, Rindge, NH, September 13, 1998.
- "Telling the Christian Story in a Post-Supersessionist Church," multimedia presentation, Notre Dame College Faculty Forum, October 21, 1998.
- Participant in panel discussion on "Civility in Public Debate," sponsored by The Interfaith Alliance Foundation, Manchester, NH, February 4, 1999.
- "Toward Education Guidelines for Shoah Education – Colleges, Universities, and Seminaries," with Rabbi Dr. Ruth Langer as part of an invitational consultation co-sponsored by the National Conference of Catholic

Bishops and the American Jewish Committee, Baltimore, February 16-17, 1999.

- "Telling the Christian Story in a Post-Supersessionist Church," multimedia presentation, Center for the Study of the Jewish and Christian Relationship, Boston College, Chestnut Hill, MA, March 15, 1999.
- "Interpreting the 'Old Testament' as a 'Shared Testament'" and "Telling the Christian Story in a Church that Affirms God's Covenant with Israel," two multimedia presentations at the 16th National Workshop on Christian-Jewish Relations, Houston, Texas, October 25 and 26, 1999.
- "A History of Christian Interpretation of the Bible," opening address of workshop entitled, "The Bible and the Churches, Notre Dame College, November 12, 1999.
- "The Theological Contributions of Pope John Paul II to Catholic-Jewish Relations," St. Leo's University, Tampa, FL, February 23, 2000.
- "Creating the Other: Anti-Judaism and Antisemitism," for Facing History and Ourselves, Simmons College, August 15, 2000.
- "Introducing *Catholic Teaching on the Shoah*" semi-annual meeting of the Catholic-Jewish Consultation Committee, consisting of representatives of the National Conference of Catholic Bishops and the National Council of Synagogues, New York, April 17, 2001.
- Panelist responding to James Carroll's presentation on his book, *Constantine's Sword: The Church and the Jews: A History*, Boston College, April 26, 2001.
- "Sharing Shalom: The Ongoing Catholic Reform in Preaching and Teaching about Jews and Judaism and Pope John Paul II's Contributions to It", spring workshop for the Institute of Religious Education and Pastoral Ministry, Boston College, April 28, 2001.

- "A Story of Shalom," Boisi Center, Boston College, October 10, 2001.
- Respondent to Yaffa Eliach, keynoter at *Honoring Faith: Respecting Each Other – Jewish and Christian Educational Tasks After the Holocaust,* Andover Newton Theological School and Hebrew College, Newton, MA, November 4, 2001.
- "Do Christians and Jews Worship the Same God?" with Jan Katzew, annual *Nostra Aetate* lecture, Fordham University, New York, November 8, 2001.
- "A Story of Shalom," Notre Dame College, Manchester, NH, Dec. 3, 2001.
- "Telling the Christian Story Anew," Mobile Region Christian-Jewish Dialogue, Mobile, AL, January 10, 2002
- "Telling the Christian Story Anew," Center for Catholic-Jewish Studies, St. Leo's University, St. Leo, Florida, March 4, 2002.
- "We Really Do Remember: The Shoah and Catholic-Jewish Relations," National Association of Diocesan Ecumenical Officers, Cleveland, OH, May 21, 2002.
- Panel Discussion on my *A Story of Shalom: The Calling of Christians and Jews by a Covenanting God*, Jewish-Christian Interfatih Partnership of New Hampshire, Manchester, NH, April 14, 2002.
- "'Reflections on Covenant and Mission' and 'A Sacred Obligation,'" for the comparative theology lunch series, Boston College, Oct. 16, 2002.
- "The Trinity and Christian Jewish Relations," Regis College Ministry Institute, Manchester, NH, Nov. 12, 2002.
- "Ethical Issues in Christian-Jewish Relations, with Ruth Langer, Boston College Theology Dept. Ethics Seminar, Dec. 6, 2002.

- "Telling the Christian Story in a Post-Supersessionist Church," St. Vincent Seminary, Boynton Beach, FL, Feb. 28, 2003.
- "Recognizing Each Other's Religious Legitimacy: How Far Can We Go?," response to Rabbi Eugene Korn, Boston College, Mar. 13, 2003.
- Changing Our Hearts: The Renewal in Catholic-Jewish Relations and Parish Life," St. Mary Seminary, Cleveland, OH, Mar. 20, 2003.
- "The Catholic Church and the Jews: A Conversion from Contempt to Fellowship," Brandeis University, Apr. 8, 2003.
- "A Legacy of Ambivalence: Jewish-Catholic Relations in Retrospect," Hebrew College, May 1, 2003.
- Response to Meir Y. Soloveitchik, "The Virtue of Hate," for the American Jewish Committee and Massachusetts Council of Churches Christian-Jewish Dialogue, May 28, 2003.
- "The Catholic Reform Toward Jews: Past Progress, Current Conflicts, Future Trends," Wellesley College, May 30, 2003.
- "Issues in Christian-Jewish Relations" (with Ruth Langer), Gralla Journalism Institute, Brandeis University, July 23, 2003.
- "Dynamics of Interreligious Dialogue: Some Cues from the Christian-Jewish Experience," Interfaith Ministries for Greater Houston, October 9, 2003.
- "Catholic Religion Textbooks on Jews and Judaism," National Catholic Center for Holocaust Education, Seton Hill University, Greensburg, PA, Nov. 8, 2003.
- "The Gospels: Christian Theologies of Judaism, and Antisemitism," Boston College, Jan. 25, 2004.
- "The Arrest and Sentencing of Jesus: A Historical Reconstruction," Creighton University, Omaha, NE, Jan. 29, 2004.

- "*The Passion of the Christ* and Interfaith Relations," panel, Jewish Council for Public Affairs 2004 National Plenum, Boston, MA, Feb. 21, 2004.
- "Gibson's *The Passion of the Christ*," 2004 Charlotte B. and Jack J. Spitzer B'nai B'rith Spitzer Forum for Public Policy, Boston, MA., Feb. 23, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Brandeis University (panel), Waltham, MA., Mar. 9, 2004.
- "Catholic Biblical Perspectives on Judaism and the Jewish People," *Fifth Annual Driscoll Lecture in Jewish-Catholic Studies*, Iona College, New Rochelle, NY, Mar. 10, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Comparative Theology luncheon, Boston College, Mar. 25, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Boston College Jewish Law Students Association and Boston College Law School St. Thomas More Society, Newton, MA, Apr. 22, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," (panel) Anti-Defamation League annual national meeting, Washington, D.C., May 3, 2004.
- "Jewish-Christian Relations" (with Ruth Langer), 2004 Gralla Fellows Program for Religion Journalists, Brandeis University, Waltham, MA., July 11, 2004.
- "A History of the Christian Teaching of Contempt for Jews and Judaism," Facing History and Ourselves Foundation, Brookline, MA., July 13, 2004.
- "One Catholic's Reflections on Jewish Discussions of the Religious Status of Gentiles and Christianity (Especially Regarding the Noahide Laws, *Avodah Zarah*, and *Shituf*)," Harvard University, Cambridge, MA., July 29, 2004.

- "Jewish-Catholic Relations: Accomplishments and Challenges," Rabbi Martin Silverman Lecture, College of St. Rose, Albany, NY, Sept. 19, 2004.
- "The Motif of Synagogue and Church in Christian Art," panel presentation as part of the Boston Public Library's restoration of the art of John Singer Sargent, Boston, Oct. 18, 2004.
- "Partners in Covenant," panel response to Irving Greenberg's *For the Sake of Heaven and Earth: The New Encounter between Judaism and Christianity*, Boston College, Oct. 19, 2004.

Lectures for church or synagogue groups

- "Approaches to Religious Education," keynote, Keene Deanery Catechetical Day, Jaffrey, NH, September 28, 1991.
- "What We Catholics Think About You Jews," Temple Adath Yeshurun, Manchester, NH, November 17, 1991.
- "Acts of the Apostles," three two-hour classes for Salem Christian Life Center, St. Patrick Parish, Pelham, NH, January 14, 28, February 4, 1992.
- "Intending Faith: Toward a Vision for Religious Education," with Dr. Michael Corso, Laconia Christian Life Center, Laconia, NH, September 19, 1992.
- "An Introduction to the Old Testament," Sacred Heart Parish, Amesbury, MA, February 10, 1993.
- "An Introduction to the New Testament," Sacred Heart Parish, Amesbury, MA, February 17, 1993.
- "Responses to Questions About Christianity," Hebrew class, Temple Ahavas Achim, Keene, NH, March 10, 1993.
- "The Origins of the Christian Anti-Jewish Tradition," St. Michael Episcopal Church, Brattleboro, VT, March 10, 1993.

- "The Origins of Christianity," guest speaker in "World Religions" course, University of New Hampshire, Manchester, NH, April 13, 1993.
- "The Role of Eve in the Yahwist's Creation Account," Women's Spirituality Group, Rye, NH, April 19, 1993.
- "Called to a Faith That Transforms," keynote address at St. Mark's/St. Jude's Ministry Enrichment Day, Londonderry, NH, September 11, 1993.
- "Making the Mission of Jesus Our Own," keynote address, Laconia Christian Life Center, Laconia, NH, September 25, 1993.
- "Lifting Up a Biblical Vision of Reality," keynote, Annual Meeting of the NH Bible Society, Concord, NH October 8, 1993.
- "The Origins of the Christian Anti-Jewish Tradition," Unitarian-Universalist Ministerial Association, Charlestown, NH, November 2, 1993.
- "The Letters of Paul," St. Thomas Aquinas Church, Derry, NH, Nov. 16, 1993.
- "Matthew's Infancy Narrative," Notre Dame College Advent luncheon, Manchester, NH. November 29, 1993.
- "Luke's Infancy Narrative," Notre Dame College Advent luncheon, Manchester, NH. December 6, 1993.
- "The Ministry of Jesus and Its Portrayal in the Synoptic Gospels," St. George Manor, Manchester, NH, February 19, 1994.
- "The Passion Narratives," Notre Dame College Lenten luncheon, Manchester, NH, February 25, 1994.
- "Exodus 20-24," St. John Neumann Parish bible study, Merrimack, NH, March 16, 1994.
- "The Origins of Christianity," guest speaker in "World Religions" course, University of New Hampshire, Concord, NH, April 6, 1994.

- "An introduction to the *Catechism of the Catholic Church,*" daylong workshop, Laconia Christian Life Center, Laconia, NH, September 10, 1994.
- "The Deuteronomic Tradition," Bedford Presbyterian Church adult education, Bedford, NH, September 25, 1994.
- "Principles for Good Bible Study," with Rev. David Doyle, Annual Meeting of the NH Bible Society, Concord, NH, October 5, 1994.
- "Introduction to the *Catechism of the Catholic Church,*" with Barbara Radtke, Manchester *Barnes and Nobles*, Manchester, NH, November 14, 1994.
- "The Prophets Isaiah: Advent of a New Creation," Notre Dame College Advent luncheon, Manchester, NH, December 5, 1994.
- "The *Catechism of the Catholic Church,*" Our Lady of Fatima parish, New London, NH. January 15, 1995.
- "The Gospel of Matthew," Bedford Presbyterian Church adult education, Bedford, NH, January 29, 1995.
- "The Consequences of Reading the Bible Critically," St. Catherine Parish, Manchester, NH, February 14, 1995.
- "Issues in Jewish and Catholic Relations," Temple Adath Yeshurun, Manchester, NH, March 17-19, 1995.
- "Acts 9-12," St. John the Evangelist Parish bible study, Concord, NH, March 27, 1995.
- "The Message of John 11," reflections for the Scrutinies ritual of the RCIA program, St. Thomas More Church, Durham, NH, March 31, 1995.
- "The Meaning and Method of Ministry," St. Charles Parish, Meredith, NH, September 9, 1995.
- "Mark 8-12," St. Marie Parish adult bible study, Manchester, NH, September 24, 1995.
- "The Origins and Effects of New Testament Anti-Jewish Polemic," Manchester Central High School, Manchester, NH, September 26, 1995.

- "Mary in the New Testament," St. Joseph Parish, Hinsdale, NH, Oct 15, 1995.
- "The Many New Testament Understandings of Church," Bedford Presbyterian Church, Bedford, NH, October 29, 1995.
- "The God of Israel and the Coming Reign: The Torah, Jesus, and Us," Nashua Deanery meeting, Nashua, NH, November 8, 1995.
- "Introduction to the Bible," St. John the Evangelist Parish RCIA, Concord, NH, November 16, 1995.
- "The Letter to the Galatians," St. Marie Parish adult bible study, Manchester, NH, February 11, 1996.
- "The Purposes of State Bible Societies," panelist, Meeting of the Board of Directors of the NH Bible Society, Concord, NH, February 16, 1996.
- "The Mystery of Suffering," Notre Dame College Lenten luncheon, Manchester, NH, March 6, 1996.
- "English Translations of the Bible," St. Marie Parish, Manchester, NH, March 10, 1996.
- "Encountering the Gospel Writers Through Their Passion Narratives," Our Lady of Fatima Parish, New London, NH, March 18, 1996.
- "Passover and Easter," television discussion program, WMUR-TV, Manchester, NH, April 7, 1996.
- "Are All Christians Ministers?" Nashua Deanery meeting, Nashua, NH, April 16, 1996.
- "Introduction to the Book of Revelation," St. Thomas Aquinas Parish, Derry, NH, May 28, 1996.
- "Great Themes of the Hebrew Bible: Covenant," St. Joseph Church, Epping, NH, October 1, 1996.
- "The Apostle Paul: His Message for Today," with Rev. Dr. David Doyle, Annual Meeting of the NH Bible Society, Concord, NH, Oct. 15, 1996.
- "The Origins of the Gospel of Mark," Notre Dame College, Manchester, NH, February 15, 1997.

- "Eschatology over the Centuries," St. Patrick Church RCIA, Milford, NH, February 19, 1997.
- "The History of the Modern State of Israel," First Congregational Church (U.C.C.), Wolfeboro, NH, February 23, 1997.
- "Growing as Leaders in Religious Education," panelist, NH Conference of Religious Educators, St. Raphael Church, Manchester, NH, March 19, 1997.
- "The Book of Exodus as the Heart of Hebrew Spirituality," St. Theresa Parish, Rye, NH, April 22, 1997.
- "Ministry in the New Testament Churches: Norms for Ministry Today," multimedia presentation, Laconia Christian Life Center, Laconia, NH, October 18, 1997
- "The Modern State of Israel: An Overview of Its History," multimedia presentation, Shalom Center, Manchester, NH, October 19, 1997.
- "The Death of Jesus as Portrayed in the Gospels," Bishop Guertin High School, Nashua, NH, October 20, 1997.
- "An Overview of Hebrew History," multimedia presentation, The Shalom Center, Manchester, NH, November 16, 1997.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part One, "Separations," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, November 19, 1997.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Two, "Rivals," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, December 10, 1997.
- "The Infancy Narratives of Luke and Matthew," multimedia presentation, Our Lady of Fatima Parish, New London, NH, December 15, 1997.

- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Three, "Dominance and Marginalization," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, March 12, 1998.
- "The Passion Narratives and the Death of Jesus," multimedia presentation, St. Theresa Church, Weston, MA, March 15, 1998.
- "Christ's Passover – Early Christian Reflection on the Life and Death of Jesus," multimedia presentation, Notre Dame College, April 1, 1998.
- "The Gospel of Matthew, chapters 8-16," St. Marie Parish adult Bible study, Manchester, NH., April 26, 1998.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Four, "Emancipation and Oppression," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, April 29, 1998.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Five, "Allies," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, May 20, 1998.
- "Telling the Christian Story in a Post-Supersessionist Church," multimedia presentations, Manchester Clergy Association, September 3, 1998.
- "Communion Requires Community," Our Lady of Fatima Church, New London, NH, October 25, 1998.
- "Preparing for Jubilee 2000," St. Joseph Men's Breakfast, Salem, NH, October 31, 1998.
- "Getting to Know the Gospel of Mark," St. Mary Magdalene Church, Tyngsborough, MA, January 11, 1999.
- "Ecumenical and Interreligious Aspects of Jubilee 2000," with Dr. Barbara Radtke. Diocese of Manchester Ecumenical and Interreligious Commission, Concord, NH, January 23, 1999.

- "Preparing for Jubilee 2000," St. Patrick Parish, Pelham, NH, Feb 21, 1999.
- "Jewish and Christian Approaches to Afterlife," Corpus Christi Church, Newton, MA, March 21, 1999.
- "Jews and Christians: History of a Love – Hate Relationship," Part One, "Separations." Multimedia presentation. Nashua Area Interfaith Council. Nashua, NH, March 21, 1999.
- "Jews and Christians: History of a Love – Hate Relationship," Part Two, "The Christian Teaching of Contempt for Jews and Judaism." Multimedia presentation. Nashua Area Interfaith Council. Nashua, NH, March 28, 1999.
- "Jews and Christians: History of a Love – Hate Relationship," Part Three, "The Modern Church's Renunciation of Anti-Judaism." Multimedia presentation. Nashua Area Interfaith Council. Nashua, NH, April 11 1999.
- "A New Path: The Recent Reform of Christian Teachings About Jews and Judaism," Temple Isaiah, Lexington, MA, April 5, 1999.
- "A New Path: The Recent Reform of Christian Teachings About Jews and Judaism," Temple Emanu-El, Haverhill, MA, April 21, 1999.
- "The Teaching of Contempt and the Implications of Its Renunciation," Multimedia lecture. Baltimore Jewish Council, Baltimore, MD, May 7, 1999.
- "The Acts of the Apostles," St. Mary Magdalen Church, Tyngsborough, MA, June 14, 1999.
- "The Teaching of Contempt and the Implications of Its Renunciation," Mulitmedia Presentation. Baltimore Jewish Council, Baltimore, MD, June 24, 1999.
- "The Catholic Approach to the Bible," videotaped presentation for the Diocese of Manchester, St. Joseph Cathedral, Manchester, NH, September 8, 1999.

- "Our Elder Brothers: Recent Catholic Teaching on Catholic-Jewish Relations," Keene Deanery Christian Life Center, Jaffrey, NH, Sept 11, 1999.
- "The Jewishness of Jesus: Implications for Preaching and Teaching," five multimedia presentations for the annual Manchester Clergy Institute, Hampton Beach, NH, September 15-17, 1999.
- "The Teaching of Contempt and the Implications of Its Renunciation," multimedia presentation, St. Thomas More Church, Baltimore, MD, September 18, 1999.
- "The Hebrew Prophets and Their Importance for Jubilee 2000," St. Joseph Cathedral, Manchester, NH, October 19, 1999.
- "Different Christian Understandings of Biblical Authority" and "The Great Jubilee of the Year 2000," presentations for the Berlin ministerium, Berlin, NH, January 7, 2000.
- "Recent Developments in Catholic-Jewish Relations Internationally," Temple Adath Yeshurun, Manchester, NH January 30, 2000.
- "Speaking the 'Truth of the Gospel' When Teaching About Jews and Judaism," Dept. of Catholic Schools and Office of Catechesis, Diocese of Manchester, Auburn, NH, March 22, 2000.
- "Christians and Jews Since the Shoah: Past Encounters, Present Issues, and Future Hopes" with Rabbi Dr. Ruth Langer, Yom HaShoah Memorial Program, Rivier College, Nashua, NH, May 2, 2000.
- "The Social World of Jesus," First Church Congregational – UCC, Nashua, NH, October 15, 2000
- "The *Shoah* and Catholic Education," St. Anselm College, Manchester, NH, November 5, 2000.
- "The Christian Teaching of Contempt for Jews and Judaism and the Implications of Its Modern Renunciation," Notre Dame College, Manchester, NH, November 9, 2000.

- "Four Gospel Portraits of Jesus," Our Lady of the Miraculous Medal Parish, Hampton, NH, January 22 and 29, 2001.
- Panelist responding to James Carroll's presentation on his book, *Constantine's Sword: The Church and the Jews: A History*, Temple Beth Elohim, Wellesley, MA, April 2, 2001.
- "Jesus and the Torah's Social Ethic," Our Lady of the Miraculous Medal Parish, Hampton, NH, April 23, 2001.
- "An Overview of Catholic-Jewish Relations Today," Yom Kippur service at Temple Beth Shalom, Needham, MA, September 27, 2001.
- Respondent to David Ketrzer, author of *The Popes Against the Jews*, Newton Free Library, Newton, MA, October 18, 2001.
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Supreme Court, U.S.
FILED
DEC - 8 2004
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No. 03-1693

IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, ET AL.,

Petitioners,

V.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS AND OHIO SENATOR BILL HARRIS IN SUPPORT OF PETITIONERS

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December 8, 2004

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QUESTIONS PRESENTED

Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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No. 03-1693

IN THE
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MCCREARY COUNTY, KENTUCKY, ET AL.,
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V.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS AND OHIO SENATOR BILL HARRIS IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE1

The Ashbrook Center for Public Affairs ("Ashbrook Center") is an educational organization located at Ashland University in Ashland, Ohio. For over twenty years the Ashbrook Center has taught the meaning and significance of America by providing a forum for the study, research, and discussion of the principles and

[1] This brief is filed with the written consent of petitioners, and in accordance with the global consent letter filed by respondents with this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

practices of the American government. Consistent with this mission, the Ashbrook Center advocates the defense of individual liberty, limited constitutional government, and civic morality. The Ashbrook Center has a strong interest in protecting the historical courthouse displays in McCreary County and Pulaski County, both as educators and as advocates of the defendants' constitutional right to post public displays containing the Ten Commandments.

Senator Bill Harris represents Ohio's 19th Senate District and is President-Elect of the Ohio Senate. As a government actor, Senator Harris recognizes the pivotal role that the Ten Commandments played in the shaping of our nation. He therefore joins the Ashbrook Center in urging this Court to uphold the constitutionality of the courthouse displays in McCreary County and Pulaski County, Kentucky. Many government buildings across the country, including some in Ohio, feature displays containing the Ten Commandments. Senator Harris recognizes that the lower courts are divided over whether and when displays containing the Ten Commandments are permissible. He supports the petitioners because he believes that the courthouse displays at issue here do not violate the Establishment Clause.

SUMMARY OF THE ARGUMENT

The plaintiffs have failed to allege an injury sufficient to confer standing. The complaints in the district court failed to allege in concrete terms that any of the plaintiffs actually saw the courthouse displays. Plaintiffs alleged only that they "have occasion" to view the Ten Commandments, and thus failed to allege a concrete and particularized injury. Additionally, plaintiffs have alleged only that they are offended by the government's action because they believe that it is unconstitutional. That is insufficient injury to establish standing under Article III.

Assuming *arguendo* that the plaintiffs have alleged an injury sufficient to confer standing, the courthouse displays in McCreary County and Pulaski County did not violate the Establishment Clause. In fact, the courthouse displays easily pass constitutional muster under the test set out by this Court in *Lemon v. Kurtzman*. The McCreary County and Pulaski County courthouses included the Ten Commandments in historical displays about the origins and development of American law and government. In each

display, the Ten Commandments appeared inconspicuously among a series of other historical documents. All of the other documents or symbols in each display were purely secular. Each display included a thematic explanation, informing viewers that the display included documents that affected the American system of law and government. Each display was only one of many historical displays throughout each courthouse, which present hundreds of different documents and demonstrate the defendants' commitment to illustrating the heritage of America and the Commonwealth of Kentucky.

Defendants offered a legitimate secular purpose for the displays – celebrating the foundations of our legal system and government – and this secular purpose was entitled to deference. The Sixth Circuit clearly erred in finding that the purpose was a sham, and applied an erroneous legal standard by requiring defendants to demonstrate a predominantly secular purpose for the displays. The Sixth Circuit also misapplied governing law and gave undue weight to the alleged unconstitutionality of earlier displays at the courthouses.

The inclusion of the Ten Commandments in the courthouse displays did not have the effect of promoting religion. No reasonable observer could conclude that the government endorsed religion simply by including the Ten Commandments in a diverse display about the history of American law and government. In each courthouse, the Ten Commandments appeared on a single piece of paper, and were surrounded by other documents that played a role in the development of the law and in our nation's history and heritage, such as the Magna Carta and the Declaration of Independence. This Court has permitted displays containing even purely religious symbols, such as nativity scenes, so long as the display as a whole does not have the effect of endorsing religion. That principle is even more applicable here, where the displays emphasized the secular impact of the Ten Commandments on American law and presented them in a way that was historically accurate. Nothing in the Establishment Clause or this Court's jurisprudence requires the omission of the Ten Commandments from a historical presentation about the origins of American law.

ARGUMENT

I. Plaintiffs Have Not Alleged Sufficient Injury to Establish Article III Standing.

As an initial matter, plaintiffs have not alleged a sufficient injury to confer standing under Article III. Although the parties did not raise the issue of standing before the Sixth Circuit, this Court will raise the issue of standing *sua sponte* when it appears that plaintiffs have failed to allege an injury in fact. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-231 (1990) ("Although neither side raises the issue [of standing] here, *we are required to address the issue* even if the courts below have not passed on it . . . and even if the parties fail to raise the issue before us.") (emphasis added).[2]

As a voluntary membership organization, the American Civil Liberties Union ("ACLU") has standing to bring a case *if* there is an alleged injury to one of its members. A voluntary membership organization has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The question remains, however, whether the individuals on whose behalf the ACLU has brought suit, or any of the named plaintiffs, have standing to sue in their own right. Plaintiffs here have failed to allege an injury sufficient to confer standing under Article III.

In order to satisfy the "case or controversy" requirement under Article III, a plaintiff must demonstrate (1) that he or she has

[2] When defending a prior set of displays before the district court, defendants unsuccessfully argued that the plaintiffs lacked standing to pursue these actions because they had not alleged "injuries in fact." *See ACLU of Kentucky v. Pulaski County*, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000); *ACLU of Kentucky v. McCreary County*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000) ("*McCreary I*"). The district court's brief analysis of the issue did not address the arguments put forth by *amici* above.

suffered an "injury in fact;" (2) a causal relationship between the injury and the challenged conduct; and (3) that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff must establish that he has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (internal quotations omitted). Mere allegation of "injury" will not suffice – the injury must be "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560; *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998).

Plaintiffs here have failed to allege a "concrete" or "actual" injury. In their complaints, plaintiffs made vague assertions regarding *potential* injuries *possibly* occurring during their performance of various civic duties. The language in the complaints is noticeably general and oblique, without a clear statement that any plaintiff actually saw the disputed displays:

> [Plaintiffs] must use their courthouse to transact civic business, such as obtaining and renewing licenses, registering property, paying local taxes and registering to vote. When transacting this civic business, they *have occasion* to view the Ten Commandments display in their courthouse.

Complaint at ¶ 15, *McCreary I*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507) (emphasis added); Complaint at ¶ 15, *Pulsaki County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509) (emphasis added). Plaintiffs then expressed their personal views about the constitutionality of the displays: "Each plaintiff perceives this Ten Commandments display as a violation of the Constitution . . . . Each plaintiff therefore is offended by the continued display and by having to view this display when transacting civic business in the [McCreary and Pulaski] County courthouse[s]." Complaint at ¶ 19, *McCreary I*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint at ¶ 19, *Pulsaki County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509). Plaintiffs' sworn verifications (attached to the complaints

pursuant to 28 U.S.C. § 1746) added no information, but merely asserted that the allegations were true.

The complaints did not allege in straightforward terms that the plaintiffs actually saw either display, but rather claimed that they "have occasion" to view the displays when visiting the courthouses. Does the phrase "have occasion" mean that the plaintiffs have the *opportunity* to view the Ten Commandments? Does it mean that they *may* see the displays at some indefinite point in the future? That they definitely *will* see the displays when they eventually fulfill their civic duties? The complaints before district court were so impossibly vague and non-descript that no one can know for certain. Whatever it means, however, such amorphous allegations are not sufficient to establish standing. "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564.

The complaints were facially inadequate because no plaintiff specifically claimed to have visited either courthouse, let alone to have actually seen the displays. Plaintiffs claimed that they "must use" the courthouses, but did not even claim to have fulfilled the civic duties (*e.g.*, paying taxes) that allegedly required their presence at the buildings. Not a single plaintiff stated that these civic duties – if they *had* been fulfilled – would have required him or her to go into an area of a courthouse where either of the displays was posted. Presumably, if any of the plaintiffs had seen the displays, the complaints could have said so in plain, unambiguous language. Plaintiffs' vague, generalized, and uncertain claims were not "concrete," and they did not allege any "particularized" or "actual" injury. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. Alleging a concrete injury is a duty of each plaintiff who seeks relief in federal court, and the murky language in the complaints simply does not suffice under Article III.

Plaintiffs' lack of standing was not cured by the consolidated amended complaint, curiously filed a month *after* the district court rendered its decision. The only material change in the amended complaint (for purposes of standing) is the assertion that "[w]hen transacting this civic business," several of the plaintiffs "have *had*

occasion" to view the displays. *See* Consolidated Amended Complaint at ¶¶ 28, 29, *ACLU of Kentucky v. McCreary County*, 145 F. Supp. 2d 845 (E.D. Ky. 2001) ("*McCreary II*") (Case Nos. 99-507, 99-508, 99-509). This belated attempt by plaintiffs to establish past injury, rather than speculative future injury, underscores the insufficiency of the original complaints. Even so, the amended complaint still fails to meet the requirements of Article III. Like its predecessors, the amended complaint fails to allege that any particular plaintiff actually saw one of the displays. The nuance between "have occasion" and "have had occasion" is a distinction without a difference because neither statement sets forth a sufficiently concrete or particularized injury. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103.

In addition to the lack of a firm factual nexus between plaintiffs and the disputed conduct, the proffered basis for the alleged injury is plainly insufficient. The complaints offered the following assertion of an injury:

> Each believes in the "separation of church and state" . . . . Each plaintiff believes that religious freedom can best be preserved if government remains strictly neutral towards religion . . . . Each plaintiff perceives this Ten Commandments display as a violation of the Constitution . . . . Each plaintiff therefore is offended by the continued display . . . .

Complaint at ¶¶ 16-19, *McCreary I*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint at ¶¶ 16-19, *Pulsaki County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509).

Such "injuries" do not confer standing. "This Court repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982) (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962) (internal citation omitted)); *see also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-22 (1974); *Laird v. Tatum*, 408 U.S. 1, 13 (1972); *Ex parte Levitt*, 302 U.S. 633, 634 (1937). It is clear that the Article III requirements

of standing "are not satisfied by 'the abstract injury in nonobservance of the Constitution asserted by . . . citizens.'" *Valley Forge*, 454 U.S. at 482 (quoting *Schlesinger*, 418 U.S. at 223 n.13); *see also id.*, 454 U.S. at 485-86 (holding that plaintiffs "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees," and that "[t]hat is not an injury sufficient to confer standing under Art[icle] III, even though the disagreement is phrased in constitutional terms").

II. The Constitution Does Not Prohibit the Inclusion of the Ten Commandments in Historical Displays on Government Property.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court articulated a flexible framework for evaluating whether governmental conduct passes muster under the Establishment Clause.[3] The *Lemon* test requires a court to determine that (1) the challenged government action has a secular purpose; (2) the action's primary effect neither advances nor inhibits religion; and (3) the action does not foster an excessive entanglement with religion. *Id.* at 612-13. A governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The Sixth Circuit affirmed the district court on the basis of the first prong. Judge Clay, writing only for himself, suggested that the courthouse displays would violate the second prong as well. Each conclusion is incorrect.

The Sixth Circuit's determination regarding the purpose of the courthouse displays is clearly erroneous and is based on an incorrect legal standard directly at odds with the prior decisions of this Court. Judge Clay's determination regarding the effects prong

[3] *Amici* join Judge Ryan in doubting the continued efficacy of the *Lemon* test, which, as he noted in dissent, has been criticized by six current members of this Court. *See McCreary III*, 354 F.3d at 464 (Ryan, J., dissenting). Nonetheless, *amici* recognize that *Lemon* was controlling on the lower courts in this case, and believe that the courthouse displays survive a properly-applied analysis under *Lemon*.

is also incorrect, and relies upon an improper application of governing law. Including the Ten Commandments in a historical display about the foundations of secular law and institutions does not have the purpose or effect of promoting religion, and does not violate the Establishment Clause.

A. The Courthouse Displays Had a Secular Purpose.

1. The Sixth Circuit Applied an Erroneous Legal Standard in its Analysis of the Defendants' Purpose for Posting the Courthouse Displays.

The Sixth Circuit applied an erroneous legal standard when it concluded that the courthouse displays lacked a secular purpose. According to the panel, "[t]o satisfy this prong of the *Lemon* test, Plaintiffs must show that Defendants' *predominate* purpose for the displays was religious." *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 446 (6th Cir. 2003) ("*McCreary III*") (emphasis added); *see also id.* at 447 ("We agree . . . that the predominate purpose of the displays was religious."); *id.* at 454 ("[T]he district court correctly concluded that Defendants' *primary* purpose was religious.") (emphasis added). This "predominate purpose" or "primary purpose" standard is not the correct standard, and is neither required nor permitted by this Court's decisions.

Government action will be invalidated under the purpose prong only if it is entirely motivated by a religious purpose. In *Lynch v. Donnelly*, this Court held that the purpose prong of the *Lemon* analysis is satisfied so long as the government can articulate "a" secular purpose. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded there was no question that the statute or activity was motivated *wholly by religious considerations*." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). This Court has reiterated the rule from *Lynch* a number of times. In *Wallace v. Jaffree*, for example, the Court stated that an action violates the first prong of *Lemon* only where the action is "*entirely* motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (emphasis added). The courts may invalidate a statute or government action "only if it is motivated *wholly* by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (emphasis added).

This Court has found a secular purpose for governmental action in a host of prior cases. Most notably, this Court upheld the display of a nativity scene (with Santa Claus and other secular symbols) in *Lynch*, 465 U.S. at 681. "Almost invariably, we have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause, typically devoting no more than a sentence or two to the matter." *Edwards*, 482 U.S. at 613 (Scalia, J., dissenting). *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 485-486 (1986); *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985); *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-124 (1982); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 654, 657 (1980); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (plurality opinion); *Meek v. Pittenger*, 421 U.S. 349, 363 (1975); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-480, n. 7 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-679 (1971) (plurality opinion); *Lemon*, 403 U.S. at 613. In the few cases where this Court has struck down laws under the Establishment Clause for lack of secular purpose, it has done so only where the government's *sole* purpose was to promote religion, or the proffered secular purpose was so overshadowed by the religious purpose that it was tantamount to no secular purpose at all. *See Edwards*, 482 U.S. at 585 ("appellants have identified no clear secular purpose"); *Wallace*, 472 U.S. at 56-57, 60; *Stone v. Graham*, 449 U.S. 39, 41(1980) (finding that "Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had *no* secular legislative purpose") (emphasis added); *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968); *see also Lynch*, 465 U.S. at 680 (describing *Stone* and *Epperson* as cases in which this Court invalidated laws "motivated wholly by religious considerations").

The Sixth Circuit was unable to conclude that the displays were motivated by wholly religious considerations. Instead, the court applied its own erroneous "predominate purpose" standard, which the court derived from its incorrect reading of Justice O'Connor's concurrence in *Lynch*. In *Lynch*, Justice O'Connor

stated that the secular purpose requirement is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). "The proper inquiry," according to Justice O'Connor, "is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691.

The Sixth Circuit has relied on Justice O'Connor's concurrence for the proposition that defendants' actions violate the Establishment Clause where their primary purpose is non-secular. *See McCreary III*, 354 F.3d at 446, 447, 454; *see also ACLU of Ohio v. Ashbrook*, 375 F.3d 484, 491 (6th Cir. 2004); *Adland v. Russ*, 307 F.3d 471, 480 (6th Cir. 2002). That is not the standard articulated by this Court in *Lynch*, 465 U.S. at 680, *Wallace*, 472 U.S. at 56, or *Bowen*, 487 U.S. at 602. Nor does it adequately capture the statements made by Justice O'Connor in *Lynch*. It is one thing to find, as the Sixth Circuit did in this case, that "Defendants' primary purpose was religious." *McCreary III*, 354 F.3d at 454. It is something altogether different to find that defendants' actions were "dominated by religious purposes," or were intended to endorse religion. *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). As explained below, including the Ten Commandments as part of a larger historical display does not evince an intent to endorse religion.

2. The Content and Context of the Displays Demonstrate a Secular Purpose.

The defendants articulated a legitimate secular purpose for including the Ten Commandments in a historical display about the origins of law and government. This secular purpose for displaying the Ten Commandments closely parallels the legitimate purpose for displaying religious symbols recognized by this Court in *Lynch*. If the Constitution permits the inclusion of a religious symbol to depict the origins of Christmas, then surely the Constitution permits the inclusion of a religious symbol to depict the origins of our secular law.

The defendants maintained that their purpose was to display documents that impacted the development of American law and government. Consistent with that secular purpose, the displays exhibited foundational historical documents and patriotic texts and

symbols, including: (1) the Star Spangled Banner; (2) the Declaration of Independence; (3) the Mayflower Compact; (4) the Bill of Rights; (5) the Magna Carta; (6) the National Motto; (7) the Preamble to the Kentucky Constitution; (8) the Ten Commandments; and (9) Lady Justice. *McCreary III*, 354 F.3d at 443. The displays also included a document that provided an explanatory theme, entitled "The Foundations of American Law and Government Display." That document explained that the displays "contain[] documents that played a significant role in the foundation of our system of law and government." *Id.*

The displays also included an explanation concerning the inclusion of the Ten Commandments, and firmly placed the Decalogue in the context of secular traditions:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

McCreary III, 354 F.3d at 443 (citation omitted). The displays did not draw undue attention to the Ten Commandments and did not emphasize the religious nature of the Decalogue.

In the district court, the defendants articulated the animating reasons for the displays and for the inclusion of the Ten Commandments. The defendants explained that the displays were intended, among other things, to illustrate "that the Ten Commandments were part of the foundation of American Law and Government;" to provide the "moral background of the Declaration of Independence and the foundation of our legal tradition;" and to "educate the citizens of the county regarding some of the documents that played a significant role in the

foundation of our system of law and government." *McCreary III*, 354 F.3d at 446-47.

The validity of displaying the Ten Commandments in this manner flows naturally from this Court's decision in *Lynch v. Donnelly*. In *Lynch*, this Court recognized a valid secular purpose for including a nativity scene – an indisputably religious symbol – in a holiday display with Santa's house and sleigh, reindeer, candy-striped poles, and the like. This Court did not evaluate the nativity scene in isolation, but rather considered the entire display as a whole. When "viewed in the proper context," the inclusion of a religious symbol with secular symbols did not evince an intent to promote religion. *Lynch*, 465 U.S. at 680. Importantly, this Court also validated the inclusion of a religious symbol because it depicted the origins of the holiday:

> The City . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. . . . The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

Id. at 680-81.

Like the nativity scene in *Lynch*, the Ten Commandments appeared in the context of broader displays that predominantly included secular documents and symbols. The Ten Commandments also reflected the "historical origins" of the law in a clear, unmistakable manner. If the Constitution permits the display of a crèche to celebrate and reflect the origins of Christmas, then surely the Constitution permits the display of the Ten Commandments to celebrate and reflect the origins of the law.

3. The Sixth Circuit Incorrectly Applied Controlling Precedent from this Court.

The government's assertion of a legitimate secular purpose is entitled to deference, unless the proffered purpose is merely a sham. *Edwards*, 482 U.S. at 586-87; *see also Wallace*, 472 U.S. at

74 (O'Connor, J., concurring). The Sixth Circuit and district court found that the defendants' stated purpose in posting the displays was a "sham," and concluded that the defendants included the Ten Commandments for predominantly religious reasons. *See McCreary III*, 354 F.3d at 446-47; *McCreary II*, 145 F. Supp. 2d at 848-49. The Sixth Circuit rested its holding on a misapplication of this Court's precedent.

The Sixth Circuit gave insufficient weight to the full context of the displays. The court barely mentioned the fact that approximately 90% of each display was purely secular, or that the title of the displays, "Foundations of American Law and Government Display," evinced a secular purpose. The court also gave little weight to the explanatory signs that accompanied the displays, which specifically stated the permissible secular purpose of presenting documents that impacted American law and government. Rather than focusing on the overall context of the displays as a whole, the Sixth Circuit "plainly erred by focusing almost exclusively" on the Ten Commandments. *Lynch*, 465 U.S. at 680; *see id.* (noting that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause").

Although the Sixth Circuit noted that the displays did not unduly emphasize the Ten Commandments, the court nevertheless rejected defendants' proffered secular purpose because of the "blatantly religious" content of the displays. *McCreary III*, 354 F.3d at 455. In its attempt to distinguish *Lynch*, the Sixth Circuit seemingly held that the Ten Commandments are different in kind than a nativity scene, at least for constitutional purposes: "The displays do not present a 'passive symbol' of religion like a crèche, which, when accompanied by secular reminders of the holiday season, has come to be associated more with the public celebration of Christmas, rather than that holiday's religious origins." *Id.*

The Sixth Circuit clearly misstated the holding in *Lynch*. The Court in *Lynch* did not approve the display of a nativity scene *despite* the "holiday's religious origins," as the circuit court suggested. *McCreary III*, 354 F.3d at 455. To the contrary, the *Lynch* Court squarely held that acknowledging the "origins" of the holiday was a valid secular purpose, even if those origins were

religious. This Court upheld the display of the crèche in *Lynch* specifically because "celebrat[ing] the Holiday and . . . *depict[ing] the origins of that Holiday* . . . are legitimate secular purposes." *Lynch*, 465 U.S. at 681 (emphasis added).

The court of appeals also incorrectly applied *Lynch* to the facts of this case. The crèche upheld in *Lynch* – a nativity scene including the figures of Jesus, Mary, Joseph, angels, shepherds, and kings – was neither more passive nor more secular than the Ten Commandments. Unlike the Ten Commandments, the crèche is a purely religious symbol. *See Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (noting that the crèche is "an unarguably religious symbol"). The *Lynch* Court upheld the government's display of the crèche, even though its sectarian significance was not negated by the setting, because the defendant had served a legitimate secular purpose by "tak[ing] note of a significant historical religious event long celebrated in the Western World." *Lynch*, 465 at 680.

If anything, the principle in *Lynch* is even more compelling when applied to this case. The Ten Commandments are *not* purely religious, and played a significant role in the development of secular law and institutions. *See, e.g., Edwards*, 482 U.S. at 593-94 (stating that the Ten Commandments did not play an exclusively religious role in the history of Western civilization); *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., concurring) (stating that most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions . . . reinforce commands of the decalogue."); *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."). In any event, the Decalogue is certainly not *more* sectarian than the figures of Mary, Joseph, and Jesus in the nativity display permitted in *Lynch*, or the 18-foot Chanukah menorah upheld in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

The Sixth Circuit also gave excessive weight to selected quotations from this Court's decision in *Stone v. Graham*, 449

U.S. 39 (1980), which rejected a Kentucky statute requiring the posting of the Ten Commandments, *standing alone*, in all public schoolrooms. The circuit court relied on *Stone* for the proposition that the Ten Commandments, unlike the nativity scene upheld by this Court in *Lynch*, are an "active symbol of religion" because several of the Commandments allegedly concern only the religious duties of believers. *McCreary III*, 354 F.3d at 455 (citing *Stone*, 449 U.S. at 42). In particular, the court referenced the Commandments mandating "worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* (quoting *Stone*, 449 U.S. at 42).

Nothing in *Stone* requires the omission of the Ten Commandments from a historical display. In fact, the *Stone* Court expressly noted that the Ten Commandments could be "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization . . . or the like." *Stone*, 449 U.S. at 42. That observation readily applies to the displays at issue here. The Ten Commandments did not appear alone, but rather were integrated with secular documents in an educational display about secular law. In any event, a finding that the Decalogue necessarily has *some* religious purpose is clearly not the same as a finding that it serves a *wholly* religious purpose, *see Lynch*, 465 U.S. at 680, or that the government intends to convey a message of endorsement. *See id.* at 691 (O'Connor, J., concurring). Following *Stone*, this Court reiterated that the Ten Commandments can serve both religious *and* secular purposes. "[*Stone*] did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards*, 482 U.S. at 593-94.

The Sixth Circuit's conclusion that several Commandments concern only the "religious duties of believers" is questionable, if not demonstrably false. While the Commandments themselves concern religious duties, that does not mean that they cannot serve a legitimate secular purpose within the context of a broader historical display. The Sixth Circuit failed to address the historical evidence cited by the defendants in their initial appellate brief, which noted that "[t]welve of the thirteen original colonies adopted the *entire* Decalogue into their civil and criminal laws."

Initial Brief of Appellants at 19, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935). Defendants also offered examples of the enactment into law of *each* Commandment by one or more of the colonies or states. *See id.* at 20-30. The Sixth Circuit simply failed to confront the evidence of the role that the first four Commandments played in the development of American law. That error is critical when one considers that defendants' stated secular purpose was to post a historical display presenting significant influences on American law. Indeed, as Judge Batchelder recently noted in dissent from another Sixth Circuit case with nearly identical facts, the "oft-repeated truism that the first three or four Commandments are 'exclusively religious' is simply not true. Including these rules as part of a historical display about the development of American law is accurate, appropriate . . . and legally permissible." *See Ashbrook*, 375 F.3d at 507 (Batchelder, J., dissenting). Even putting aside this historical debate, the Sixth Circuit clearly gave undue emphasis to four of the Ten Commandments, which comprised less than half of one document in a much larger overall display.

4. The Sixth Circuit Erroneously Scrutinized the Historical Accuracy of the Displays.

Rather than focusing on the full context of the displays, the Sixth Circuit scrutinized the accuracy of the prefatory description of the Ten Commandments, which stated, in relevant part:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence . . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

McCreary III, 354 F.3d at 451.

According to the court, this explanation presented two problems. First, the court stated that "the evidence [that the Ten Commandments influenced Western legal thought] does not appear in the actual display . . . so an observer would not actually be made aware of these facts." *Id.* at 452. This is wholly

irrelevant to the question of defendants' *purpose*. Whether an observer is aware of the historical connection between the Ten Commandments and the law is a completely separate question from what defendants' motivations were in posting the displays. Indeed, this Court upheld the display of a crèche in *Lynch* without requiring any explanatory documents whatsoever. *See Lynch*, 465 U.S. at 671.[4] Nothing in this Court's case law requires any explanatory sign at all – let alone the extensive historical exegesis required by the Sixth Circuit in this case – in order to demonstrate defendants' purpose. Whether the displays could have been more thorough, or could have better explained the impact of the Ten Commandments, is completely distinct from the question of whether the displays were motivated by a religious purpose.

Second, the court went to great lengths to demonstrate that the Ten Commandments did not inspire the drafting of the Declaration of Independence. *See McCreary III*, 354 F.3d at 452-53. The Sixth Circuit repeatedly noted the lack of a "single historical source in support of the proposition that the Ten Commandments inspired the drafting of the Declaration of Independence." *Id.* at 453. That claim, however, was not made in either display. The displays made a much more modest assertion, stating only that the Ten Commandments provided the "moral background" of the Declaration and of our legal tradition. Nor would it be dispositive if the explanatory documents *had* made the claims of which they were accused. Even assuming *arguendo* that the Sixth Circuit's reading of history is correct, the accuracy of the displays is a separate and distinct issue from the defendants' purpose in posting them. As its moniker indicates, the "purpose prong" of the *Lemon* test focuses on defendants' motivations, not on the relative educational merits of viewing the displays. Indeed, as Judge Ryan noted in dissent, "the source of Thomas Jefferson's 'belief in divinely bestowed unalienable rights' proclaimed in the Declaration of Independence is utterly immaterial, because it does

[4] This Court's failure to require an explanatory plaque in *Lynch* was certainly not because the Court had not considered the issue. Indeed, in his dissent from *Lynch*, Justice Brennan suggested that he would have required such a document. "[T]he City has done nothing to disclaim government approval of the religious significance of the crèche . . . Pawtucket has made no effort whatever to provide a . . . cautionary message." *Lynch*, 465 U.S. at 706-07.

not resolve the real issue before us today, which is whether the defendants' avowed secular purposes are shams." *Id.* at 468 (Ryan, J., dissenting). The issue before the court was whether the government posted the displays for the sole purpose of endorsing religion. The answer to that question is "no."

5. The Sixth Circuit Erred in Finding that the "Evolution" of the Displays Demonstrates a Non-Secular Purpose.

Both the district court and the court of appeals made much of the fact that the defendants changed the content of the displays several times, ostensibly for the purpose of making them permissible under the Establishment Clause. Because the initial displays consisted of the Ten Commandments standing alone, the courts inferred that the earlier displays had "imprinted the defendants' purpose . . . with an unconstitutional taint." *McCreary III*, 354 F.3d at 457 (quoting *McCreary II*, 145 F. Supp. 2d at 850). According to the court of appeals, this permanent taint "strongly indicate[s] that the primary purpose was religious." *Id.* at 458.

The lower courts' assumption of unconstitutional "taint" is simply not supported by the case law. The Sixth Circuit relied heavily on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), for the proposition that prior noncompliance with the Establishment Clause had to be considered in determining whether the defendants' courthouse displays were constitutional. *See McCreary III*, 354 F.3d at 455-56. Nothing in *Santa Fe*, however, requires the result reached by the circuit court. Although the *Santa Fe* majority considered the text and history of the school policy at issue in that case, the Court also made clear that the policy was, in fact, invalid on its face. "[T]he text of the [] policy *alone* reveals that it has an unconstitutional purpose." *Santa Fe*, 530 U.S. at 314 (emphasis added).

The factual differences between the policy at issue in *Santa Fe* and the displays at issue here are so great as to render any comparison irrelevant. In *Santa Fe*, the plaintiffs challenged a school district practice that permitted students to deliver invocations and benedictions at graduation ceremonies and at football games. In the face of litigation, the district altered the

policy several times, ultimately arriving at a policy that permitted students to vote on whether they wanted to have a student-led "invocation and/or message" at football games, and if so, who should give the invocation or message. *See id.* at 298 and n.6. The policy remained substantially unchanged from its original version. In this case, however, the displays at issue have changed significantly. Initial displays consisted of only framed copies of the Ten Commandments. *McCreary II*, 145 F. Supp. 2d at 846. A second set of displays added secular documents, such as excerpts from the Congressional Record, which contained references to the role of religion in American life. *See McCreary I*, 96 F. Supp. 2d at 684. After the district court enjoined those displays, *id.* at 691, defendants posted additional displays, ultimately arriving at the "Foundations of American Law and Government Displays." The current displays contain numerous secular documents – without religious references – and are accompanied by explanatory documents setting forth their secular purpose. They bear little resemblance to their predecessors. Whereas the final policy analyzed by this Court in *Santa Fe* was little more than a recycled version of earlier unconstitutional policies, the displays at issue here are significantly different from the initial courthouse displays and do not evince a facially religious purpose.[5]

Under the *McCreary* analysis, the government can seemingly never cure the unconstitutionality of its prior conduct. This simply cannot be the case, unless we are to assume that all constitutional violations continue in perpetuity. "[G]overnmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from,

[5] The Sixth Circuit also incorrectly applied that circuit's own case law regarding the effects of past conduct. The court relied heavily upon selected quotes from *Adland v. Russ*, 307 F.3d at 480, for the proposition that defendants' earlier policies or practices demonstrate a non-secular purpose for defendants' present actions. *See McCreary III*, 354 F.3d at 456. In contrast to the *McCreary* panel, however, the *Adland* court specifically stated that the defendants *could cure their constitutional defects by changing the composition of the display*: "While we cannot pass on the merits [of proposals to amend the display], we are nevertheless confident that with careful planning and deliberation . . . the Commonwealth can permissibly display the monument in question." *Id.* at 490. The *McCreary* court not only ignored this language but in fact incorrectly relied on *Adland* for the opposite conclusion.

practices that are contrary to law." *ACLU of Kentucky v. McCreary County*, 361 F.3d 928, 933 (2004) (Boggs, C.J., dissenting). Indeed, for exactly this reason, the Third Circuit, Seventh Circuit, and (before this case) the Sixth Circuit have explicitly rejected such arguments. *See ACLU of New Jersey v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose . . . .") (quotation omitted); *Granzeier v. Middleton*, 173 F.3d 568, 574 (6th Cir. 1999) (holding that the state defendants could continue with the Good Friday holiday closing by adopting a secular rationale for the closing); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995) (same). As the Sixth Circuit itself stated in *Granzeier v. Middleton*, "the fact that a particular [policy] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Granzeier*, 173 F.3d at 574.

This Court's jurisprudence also undermines the inference of an improper religious intent based on prior conduct. In *McGowan v. Maryland*, 366 U.S. 420 (1961), a group of defendants charged with violating Maryland's "Sunday closing laws" challenged the laws as an unconstitutional establishment of religion. This Court acknowledged that "the original laws which dealt with Sunday labor were motivated by religious forces," *id.* at 431, but nevertheless upheld the laws because they had later taken on a secular purpose. The *McGowan* Court explicitly rejected the reasoning that underlies the Sixth Circuit's theory of "unconstitutional taint."

> The present purpose and effect [of Sunday closing laws] is to provide a uniform day of rest for all citizens . . . . To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because . . . such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare . . . .

Id. at 445.

The lower courts' imputation of unconstitutional taint is also incongruous with this Court's holding in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Although that case was decided on the "effects" prong of the *Lemon* analysis, it is instructive in the present discussion of purpose as well. The *Allegheny* Court invalidated the government's display of a crèche on a courthouse staircase but allowed the public display of an 18-foot menorah as part of a larger display in front of the city-county building. As the Third Circuit has pointed out, "not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building." *Schundler*, 168 F.3d at 105 n.12. If a display is not tainted by a contemporaneous unconstitutional display, then surely a display is also not tainted by a materially dissimilar prior display.

B. Including the Ten Commandments in the Courthouse Displays Did Not Have the Effect of Endorsing Religion.

The Sixth Circuit limited its holding to the conclusion that the defendants had a non-secular purpose for posting the Ten Commandments, and did not reach the effects prong of the *Lemon* test. *See McCreary III*, 354 F.3d at 462 (Gibbons, J., concurring) ("I express no opinion as to whether the displays violate the 'effect/endorsement' prong of the *Lemon* test."); *id.* at 479 (Ryan, J., dissenting) ("[T]he opinions of my brother, Judge Clay, on this issue, are his own and do not represent those of the majority of the panel."). The courthouse displays survive scrutiny under the effects prong as well because no reasonable observer could conclude that the inconspicuous inclusion of the Ten Commandments in a historical display amounted to government endorsement of religion.

In evaluating the effects prong of the *Lemon* test, courts apply the "endorsement test" first articulated by Justice O'Connor in her concurring opinion in *Lynch*, *see* 465 U.S. at 690, and later embraced by this Court's decision in *Allegheny*. The key question is whether a "reasonable observer" would conclude that the government had endorsed religion by allowing the challenged practice. *See Allegheny*, 492 U.S. at 592-94; *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). While there is always someone who

might perceive a particular action as an endorsement of religion, that person does not personify the reasonable observer. "A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Pinette*, 515 U.S. at 780; *see also Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (stating that "the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from . . . discomfort") (quoting *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring)). To the contrary, a court's analysis of the display must be grounded "in reality," *see Lynch*, 465 U.S. at 678, and must avoid "a stilted over-reaction contrary to our history and to [this Court's] holdings." *Id.* at 686.

A reasonable observer could not conclude that the government endorsed religion by including the Ten Commandments in broad historical displays about the foundations of American law and government. In each of the displays, the Ten Commandments appeared on a single, normal-sized sheet of paper. Each display also included the text of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, a printed image of Lady Justice, and an explanatory sign identifying the foregoing documents and stating that the display presented "documents that played a significant role in the foundation of our system of law and government." *McCreary III*, 354 F.3d at 443. As the Sixth Circuit recognized, "the displays did not provide undue physical emphasis to the Ten Commandments. . . . [they] appeared on a single piece of paper, the same size as that containing the secular documents." *Id.* at 454.

Visitors to either courthouse encounter several other large historical displays which provide additional context to the displays at issue here. In the McCreary County courthouse, there are *hundreds* of historical documents displayed throughout the building, including 58 in the judge's office, 41 in the waiting room, 124 near the side entrance to the courthouse, 33 in the fiscal courthouse, and 28 in the conference room. *See* Initial Brief of Appellants at 7, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935). The Pulaski County courthouse posted similar

displays throughout the building. *Id.* Visitors to either courthouse pass numerous other displays which demonstrate to observers the defendants' strong commitment to illustrating the rich historical heritage of both America and the Commonwealth of Kentucky. The Ten Commandments simply do not confront visitors to either courthouse in a manner that could lead a reasonable non-adherent to question his or her standing in the political community. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

The district court's orders in this case put the defendants in a no-win situation. Prior displays were enjoined because they allegedly focused too much on religion, and the religious message was not sufficiently diluted by purely secular documents. *See McCreary I*, 96 F. Supp. 2d at 689. The present displays were enjoined, however, specifically because the Ten Commandments were surrounded by purely secular documents and symbols:

> The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents. . . . The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement.

McCreary II, 145 F. Supp. 2d at 851. Judge Clay adopted this reasoning in its entirety. *See McCreary III*, 354 F.3d at 459.

No display containing the Ten Commandments could survive scrutiny under these shifting standards. A display that is not sufficiently diluted by secular documents will be too religious, *McCreary I*, 96 F. Supp. 2d at 689, but a display that incorporates secular documents will "accentuate[] the religious nature of the Ten Commandments." *McCreary III*, 354 F.3d at 459 (quoting *McCreary II*, 145 F. Supp. 2d at 851). Applying these contradictory rules enabled the lower courts to effectively establish a per se rule against *any* display containing the Ten Commandments – a rule explicitly rejected by this Court. *See Edwards*, 482 U.S. at 593-94 ("[*Stone*] did not mean that no use

could ever be made of the Ten Commandments . . . ."); *Lynch*, 465 U.S. at 678 ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."). This has not gone unnoticed even by other judges sitting in the same district where this case originated: "[N]either the Constitution nor *Stone* impose such a would-be constitutional straightjacket . . . for governments legitimately wishing to display a document having great secular influence on the development of our laws . . . ." *ACLU of Kentucky v. Mercer County*, 219 F. Supp. 2d 777, 791 (2002).

The government does not *endorse* religion by *acknowledging* the role of religion and religious symbols in secular society. Like the nativity scene in *Lynch*, the display of the Ten Commandments at issue here did not endorse religion. In *Lynch*, this Court held that a nativity scene, surrounded by secular objects and symbols, did not confer a substantial and impermissible benefit on religion. *See Lynch*, 465 U.S. at 681-82. The Court approved its inclusion in the broader holiday display, "notwithstanding the religious significance of the crèche." *Id.* at 687. In her concurrence, Justice O'Connor found "clearly erroneous" the district court's holding that "the City's use of an unarguably religious symbol 'raises an inference' of intent to endorse." *Id.* at 691 (O'Connor, J., concurring). Even though the sectarian significance of the nativity was *not* negated by the setting, the composition of the overall display made the government's use of the crèche no more an endorsement of religion than such acknowledgments of religion as legislative prayers or the opening of court sessions with "God save the United States and this honorable court." *Id.* at 693 (O'Connor, J., concurring). The same principle should apply here, where the Ten Commandments were posted along with numerous secular documents and the composition of the overall displays did not endorse religion.

This Court's decision in *County of Allegheny v. ACLU* also supports the conclusion that a reasonable observer would not perceive the courthouse displays as a government endorsement of religion. In *Allegheny*, this Court allowed the public display of an 18-foot menorah as part of a larger "Salute to Liberty" display. *See Allegheny*, 492 U.S. at 582. In doing so, this Court specifically noted that the menorah has both religious and secular

significance: "The menorah, one must recognize, is a religious symbol . . . But the menorah's message is not exclusively religious." *Id.* at 613. Like the menorah in *Allegheny*, the Ten Commandments are "not exclusively religious," but rather have both religious and secular aspects, and were presented as parts of larger displays that emphasized their secular impact on our society. The principle derived from *Allegheny* is even more compelling in the present case. The 18-foot menorah permitted by this Court was accompanied by a Christmas tree and a sign saluting liberty. In the courthouse displays, the Ten Commandments were accompanied by many more secular documents and symbols, all linked by a common secular theme that was clearly spelled out in their title and explanatory documents.[6]

This Court has upheld numerous other governmental policies and acknowledgements of religion that provide far greater benefit to religion than any incidental benefit from the displays here. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (upholding a school voucher program even though majority of participating students had enrolled in religiously-affiliated schools); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (upholding a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools); *Witters*, 474 U.S. 481 (upholding a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a state legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state); *Mueller*, 463 U.S. 388 (upholding a program authorizing tax deductions for educational expenses even though 96% of the beneficiaries were parents of children in religious schools); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (allowing non-categorical grants to church-

[6] The inclusion of the Ten Commandments in the courthouse displays was unlike the display of the nativity scene rejected by this Court in *Allegheny*. The Court invalidated the government's display of a crèche *standing alone* on a courthouse staircase because "nothing in the context of the display detracts from the crèche's religious message." *Allegheny*, 492 U.S. at 598. That is completely inapposite to the present case, where the Ten Commandments were included in a much larger display that emphasized their role in the development of secular institutions.

sponsored colleges and universities); *Tilton*, 403 U.S. 672 (permitting federal grants for college buildings of church-sponsored institutions); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding tax exemptions for church properties); *Board of Education v. Allen*, 392 U.S. 236 (1968) (permitting the expenditure of public funds for textbooks supplied to students attending church-sponsored schools); *Everson v. Board of Education*, 330 U.S. 1 (1947) (allowing the expenditure of public funds for transportation of students to church-sponsored schools). Surely there is no greater aid to religion deriving from the historical displays in the McCreary County and Pulaski County courthouses than from these policies that do not violate the Establishment Clause. *See also Lynch*, 465 U.S. at 681-82. Any benefit to religion from the courthouse displays was "indirect, remote and incidental," and therefore constitutional. *See id.* at 683.

It would be patently unreasonable to conclude that the courthouse displays "send[] a message to nonadherents that they are outsiders, not full members of the political community." *Id.* at 688 (O'Connor, J., concurring). The courthouse displays did not compel belief or acquiescence, or command participation in any form of religious exercise. They did not assert a preference for one religious denomination over others, or promote religion over non-religion, or involve the state in the governance of any church. *See ACLU of Ohio v. Capitol Square Review and Advisory Board*, 243 F.3d 289, 299-300 (6th Cir. 2001); *see Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2333 (2004) (Thomas, J., concurring) (stating that a policy comports with the Constitution where "the State has not created or maintained any religious establishment" and the policy "does not expose anyone to the legal coercion associated with an established religion"). Far from promoting one religion over another, or promoting religion over non-religion, the purpose of the displays was merely to illustrate historical documents that played a significant role in the development of American law and government. The Decalogue undeniably *was* one such influence. *See, e.g., McGowan*, 366 U.S. at 462 (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions . . . reinforce commands of the decalogue."). The Establishment Clause surely does not require the omission of

religious material from a historical narrative, especially when the religious material indisputably played a role in the development of secular institutions.

III. Conclusion.

Justice Goldberg found it necessary to remind us more than 40 years ago that "[n]either government nor this Court can or should ignore the significance of the fact that . . . many of our legal, political and personal values derive historically from religious teachings." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Plaintiffs here would have this Court do exactly that. Fortunately, "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part) (quoting *Lynch*, 465 U.S. at 678)).

Petitioners Jimmie Greene and Darrell BeShears displayed small, unobtrusive copies of the Ten Commandments in their courthouses, as part of a series of documents and symbols that were accurately described as significant influences on the development of our law and government. The Establishment Clause does not require the omission of religious material from a historical narrative or preclude any mention of religious influences on our legal and political heritage. It is not, and has never been, unconstitutional to make observations of historical fact or to acknowledge the role played by religion in civic life. The Sixth Circuit erroneously determined that including the Ten Commandments in a secular historical display evidenced an intent to establish religion, and should be reversed.

Respectfully submitted,

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Dated: December 8, 2004

Supreme Court, U.S.
FILED
JAN 7 - 2005
OFFICE OF THE CLERK

No. 03-1693

In The
Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY,
Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The
Sixth Circuit

BRIEF OF *AMICI CURIAE* ATHEIST LAW CENTER *et al.*, IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The Atheist Law Center, which coordinated representation of all *amici* here, is a nonprofit Alabama corporation whose mission is educational and legal advocacy on behalf of citizens who espouse no religious belief. When Alabama Chief Justice Roy Moore erected a 5,280-pound granite Decalogue in the rotunda of the Alabama Judicial Building and indicated that doing so was homage to the foundations of American law, the Center requested to display a model of an atom to symbolize the contributions of rationality and Enlightenment philosophy to American law and was refused. The Center is joined by Alabama *amici* Pat Cleveland, president of the Alabama Freethought Association, who was involved in 1990s federal and state cases challenging then-circuit judge Roy Moore's sectarian courtroom prayer and Decalogue display over the judicial bench; Michael Chandler, a DeKalb County Baptist, parent, and school administrator who challenged Alabama's fourth school-prayer statute enacted within a fifteen-year period; and Wayne and Sue Willis, Jewish parents who challenged religious harassment and Establishment Clause violations in rural Pike County, where their children were the only Jews in the school

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[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk. *Amici* also submitted a brief in the simultaneously pending case of *Van Orden v. Perry*; this brief is substantially the same but for additions in Part III.

system.[2]

Other Alabama *amici*, who have followed with alarm Alabama's several well-publicized theocratic flirtations over the past decade, are the Wiregrass Atheists, the United Universists and the Birmingham Atheists (formed in response to Chief Justice Roy Moore's installation of the granite Decalogue). *Amici* Dallas-Fort Worth Metroplex Atheists, North Texas Church of Freethought in Dallas, Texas, and Camp Quest (a Kentucky corporation that runs an atheist summer camp) have a particular interest in this case since Decalogue cases from their home states simultaneously pend here; Camp Quest has a direct concern about the government property in this very case.

These *amici* are joined by Scouting for All, which seeks to influence the Boy Scouts of America (BSA) to stop discriminating on the basis of spiritual beliefs or sexual orientation; Rob Sherman Advocacy of Chicago, Illinois, whose founder has challenged BSA's religious oath and discrimination against atheists; Atlanta Freethought Society; Unitarian Universalist Infidels; East Bay Atheists (San Francisco); Atheist Station (Altoona,

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These plaintiffs, who were represented by counsel of record here, experienced community harassment that variously included death threats, vandalism, and ostracism. Cleveland received suspicious mail that necessitated law enforcement use of water cannons; Chandler and his wife, also a teacher in DeKalb County, were hounded into early retirement and their son endured taunting; the Willis family's children suffered assaults, offensive graffiti, taunts, and forced participation in Christian activities before the family decided to leave Alabama.

Pennsylvania); the Military Association of Atheists and Freethinkers; Minnesota Atheists; Boulder Heretics (Colorado); the Secular Student Alliance; and the New Orleans Secular Humanist Association. All of these *amici* are nonprofit, humanist, atheist, or freethinker organizations with regional or national membership dedicated to strict separation of church and state. *Amicus* EvolveFISH is a commercial concern which creates and distributes symbols and materials in the U.S., with particular emphasis on regions where church/state violations have been most pronounced.

All *amici* have an interest in defending the principle often articulated by this Court that the state may not favor religion over irreligion. All oppose government action that confers privilege on religious citizens and which renders citizens who do not share dominant religious beliefs (or any religious beliefs) "outsiders." All subscribe to James Madison's warning that "it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens." *The Complete Madison* 299-301 (S. Padover, ed. 1953) (quoting from "Memorial and Remonstrance Against Religious Assessments, 1785"). *Amici* offer this brief because this case presents a danger of deviation from the cherished principle that atheists, dissenters from majoritarian compunctions to civic religion, freethinkers, humanists, and infidels are "constitutional people" entitled to First Amendment protections.

SUMMARY OF THE ARGUMENT

The Establishment Clause forbids government from telegraphing to nonreligious citizens that they are less than valued members of the political community. When the state chooses to place religious symbols on public property, particularly at the seat of government, its choices have the expected effect of symbolically uniting the governmental and religious messages.

The "reasonable observer" standard presently employed to test for government endorsement of religion fails to take account of the evocative power of symbols in government's hands and fails to appreciate how religious symbols can be used as cudgels against those who do not subscribe to "mainstream" American religions or to any religion at all. It rests on assumptions that undercut Establishment Clause values and on false analogies.

The Court should abandon the reasonable observer standard and adopt a strong presumption that displays on public property that symbolically unite government and religion are unconstitutional.

ARGUMENT

The Establishment Clause rests "on the belief that a union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). It also tends to inject divisiveness detrimental to the social good and antithetical to constitutional guarantees of freedom of conscience. As the Court has observed, "The centuries immediately before and

contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions . . ." *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947). While religion may provide "spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance." *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985), *overruled in part on other grounds*, *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

But it is not only sectarian bullying that the Establishment Clause proscribes. "[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

The Court's recognition that government should not use its bully pulpit for the benefit of an "elect" among the faithful is plain in the language of its *Lynch/Allegheny* regime, which commands the state not to "send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 495-96 (1989) (quoting *Lynch*, 465 U.S. at 687) (O'Connor, J.,

concurring).

The state's appropriation and emplacement of religious symbols telegraphs the theocratic chauvinism that this Court has proscribed. In cases too numerous to cite, this Court has proclaimed that government may not favor religion over irreligion – and yet government Decalogues proliferate.

Amici suggest that Decalogues proliferate because the "ins" and "outs" dichotomy of *Lynch/Allegheny* is undercut by the "reasonable observer" standard articulated in those very cases – a standard that is insufficiently respectful of nonadherents and which lends itself to levels of abstraction and rationalization that militate against effective Establishment Clause enforcement. The "reasonable person" standard ignores what we know of the visceral way in which the populace responds to symbols served to it by government, and is too amenable to legitimating endorsements because it provides little more than a silhouette to lower courts (merely instructing them that an endorsement problem is "a legal question to be answered on the basis of judicial interpretation of social facts"). *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring).[3] It gives license to disregard the obvious

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[3] Lower courts as well as some Justices, scholars and irreligious citizens may believe that *Lynch* and *Allegheny* broadly legitimate state displays of religious symbols. In each, the Court examined a Christian creche. In each, it applied largely the same test. And yet it struck one display while sustaining the other. *Allegheny* itself, in examining a menorah and Christmas tree in addition to the creche, seemed to some members of the Court internally inconsistent. The fact that the creche was struck in *Allegheny* while the Christmas tree and menorah escaped scrutiny, and the Christmas tree was even held to "secularize" the menorah, mystified three dissenting Justices. *See* 492 U.S. at 638-46 (Brennan, J., dissenting) (joined by Marshall and Stevens, JJ.). Justice Stevens believed that the juxtaposition of the menorah and Christmas tree, far from secularizing either symbol, reinforced the religious character of both. *Id.* at 654-55 (Stevens, J., dissenting).

import of the symbol itself as well as the dispositive fact that government has incorporated it as government's own speech, on government property[4] and instead to fixate on the degree of congruence with a faulty analogy to a museum and the phantom of "history."

A different standard, which Justice Stevens has suggested, would be more respectful of nonadherents and in harmony with the proposition that the Establishment Clause protects atheists no less than Baptists who disapprove of prayer over school intercoms. A different standard would indicate a practical appreciation of the way in which governments deploy symbols and citizens synthesize them. For ultimately, the process of sending and receiving the message is the issue. Just as an appropriate constitutional test demands that we distinguish between real threat and mere shadow, *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring), it must also strictly police against displays that forge a symbolic unity between religion and government.

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[4] Indeed, one wonders if "endorsement" is actually descriptive of a scene in which government has incorporated a religious symbol into a permanent display on its property.

I. THE COURT'S "REASONABLE OBSERVER" IS LEARNED IN THE LAW BUT NOT A STUDENT OF REALISM, AND HE SHOULD BE RETIRED.

Pavlov, it seems, never met Pinette. Scholars of politics, no less than of the arts, have taken note that all the world's a stage. As the pioneering political scientist Murray Edelman has explained, the evocative power of symbols in public settings results *precisely from the fact that government has ordained the content and provided the stage*:

> The courtroom, the police station, the legislative chamber, the party convention hall, the presidential and even the mayoral office, ... all have their distinctive and dramaturgical features, planned by the arrangers and actors in the event and expected by their audiences ...
> ...
>
> The common element in the political settings mentioned here and in others that could have been mentioned is their contrived character. They are unabashedly built up to emphasize a departure from [peoples'] daily routine, a special or heroic quality in the proceedings they are to frame. Massiveness, ornateness and formality are the most common notes struck in the design of these scenes, and they are presented upon a scale which focuses

> constant attention upon the difference between everyday life and the special occasions when one appears in court, in Congress, or at an event of historic significance.
>
> We know something of the impact of the manifestly contrived setting .... Such backgrounds make for heightened sensitivity and easier conviction in onlookers, and the framed actions are taken on their own terms. ... The creation of an artificial space or semblance thus sets the stage for a concentration of suggestions: of connotations, of emotions, and of authority. ... Through the creation of an artificial space a particular set of impressions and responses can be intensified, serving to condense and organize a wide range of connotations, free of the irrelevancies, distractions, and qualifications of which everyday life mainly consists.
> ... The conspicuousness with which a setting is presented for observation and special attention in any social situation defines the degree to which an audience is being injected into an artificial universe or semblance. The latter in turn makes easier the functioning of evocative . . . symbolism . . . and involves a corresponding diversion of attention from cognitive and rational

> analysis and manipulation of the environment ... [C]ognitive manipulation of the environment or of referential symbols [will] produce a desired result ... [such as putting the focus] upon abstractions that powerfully grip emotions. [This is] not because there is a demonstrable tie to desired results, as in logical or mathematical manipulation, but precisely because there is no tie to consequences at all, no means of verification. People are therefore free to assure each other that the symbol means what they all passionately want it to mean: rain, fertility, a good crop, or another shared need. ... Social suggestion, not individual work and verification, becomes the stimulus of activity, and what is suggested is implicit in the setting.

Murray Edelman, *The Symbolic Uses of Politics* 95-98 (8th ed. 1977).

Manipulation of symbols within governmental settings is designed to: (1) impress a large audience (as opposed to one-on-one persuasive discourse); (2) legitimize future acts or policies of government, maximizing the chances that citizens will acquiesce in the rules they embody; and (3) establish or reinforce the citizen's definition of himself through identification with the polity or public officials. *Id.* at 98. Symbols of majoritarian preference thus become self-reifying. While government is always making a calculation in choosing

and staging symbols, the citizen's response is more primitive than cerebral, hinting that Justice Kennedy, as he facetiously wondered if an Establishment Clause standard could be derived from "intuition and a tape measure," was on to something. *See Allegheny County*, 492 U.S. at 675 (Kennedy, J., dissenting).

We do not hold court in meat-packing plants or water parks, but rather in settings that amplify the seriousness of the proceedings that occur there. "The judicial bench and chambers, formal, ornate, permanent and solid . . . 'prove' the deliberateness, scholarliness, and judiciousness of the acts that take place in them, even [if] careful study of some of these acts in a university or newspaper office (different settings) may indicate they were highly arbitrary, prejudiced, or casual." Edelman, *supra*, at 99.

In sum, settings for governmental action and symbols used by government are not neutrally chosen and are not meant to be innocuous. Careful staging of symbols offers or reinforces government's motivation. *Id.* at 101-02. Symbols are, moreover, durable, replicating on repeated exposure the same emotions they evoked on a first viewing, so that the setting in which government places a symbol is part of its effort to influence citizens' value structures. *Id.* at 106.[5]

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[5] Many years before the Court had developed formal tests for Establishment Clause analysis, it understood that symbols are irresistible preceptorial tools for government, writing:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or

If this theory of why government chooses to control not merely the message but also every nuance of the medium is sound, this Court's "reasonable person" standard underestimates the potency of symbols by overestimating the rationality of responses to them. Symbolic recognition and actuation does not operate on the cool plane of law where precedents, at least in theory, are dispassionately weighed against the particular reindeer, creche, and Christmas tree *du jour*. The Court's reasonable observer is an abstraction considerably removed from the masses who participate in cultural symbols offered to them rather than merely passively and neutrally filtering them. Such a standard is better understood as the judiciary mirroring itself through the glass of precedent

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> flag to symbolize some system, idea, institution, or personality is a shortcut from mind to mind. . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance and respect: a bowed or barred head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943). In the context of Decalogue displays, for example, just as Alabama Chief Justice Roy Moore intended in installing a 5,280-pound granite monument in the hushed marble rotunda of the Alabama Judicial Building, cordoned off with red velvet, visitors were moved to bow their heads or bend their knees and pray. *See Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

than as a measure that accounts for an ordinary citizen's reality. At any rate, the standard the Court has chosen permits capitulation to the state's religious message far too easily. This is strangely incongruous, since the Court at the same time it purports to apply this standard recognizes that people react emotionally far more than cerebrally to symbols, that they react like "insiders" or "outsiders." The Court's insider/outsider dichotomy captures a central value of the Establishment Clause, even as the reasonable observer standard steers clear of the viscera.

II. THE REASONABLE OBSERVER STANDARD DEVALUES NONADHERENTS AND OVERVALUES "HISTORY."

Ironically, the reasonable observer standard coexists in cases in which the Court's discussions reaffirm the commitment to avoiding preference for religion, even while the standard itself has pedigreed governmental favoritism for America's "mainstream" religions. *See* John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 Harv. C.R.-C.L.L. Rev. 563 (2003). References to (one, singular) God abound in the Court's lexicon, thus implicitly privileging monotheistic Christians and Jews as a starting point. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Professor Tribe has wondered why the perspective to be applied in the *Lynch/Allegheny* regime is that of the reasonable "observer" rather than the reasonable "nonadherent." *See* Lawrence Tribe, *American Constitutional Law* 1293 (2d ed. 1988). In fact the concern

for nonadherents expressed in *Lynch* and *Allegheny* is undone by the adoption of the reasonable observer as the benchmark of constitutionality. The nonadherent entitled to constitutional solicitude by the lights of these very cases is transformed by comparison to his "reasonable observer" counterpart into a person of trifling concern whose piddling grievances can be dismissed, and dismissed with an epithet, at that. A person who objects to Decalogues, Latin crosses, or other State religious promotions in core government buildings, parks, or public schools can be rejected as an "isolated" nonadherent who feels mere "discomfort [at] viewing symbols of a faith to which [he] does not subscribe," *Cap. Sq. Rev. Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring); an "uninformed" "heckler," *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2004), *cert. granted*, No. 03-1500, 2004 U.S. LEXIS 6691 (Oct. 12, 2004); "fastidious," *Zorach v. Clauson*, 343 U.S. at 313; or "fevered." *See Newdow v. United States Cong. (Newdow I)*, 292 F.3d 597, 614 (2002) (Fernandez, J., concurring in part and dissenting in part) (individual opinion later withdrawn). Indeed, one wonders if some of these cases contemplate that a nonadherent could be reasonable.

Rejection of the "reasonable nonadherent" standard posed by Professor Tribe has resulted in an endorsement analysis that, if not uniformly prone to assailing atheists for their febrile brains, is far too susceptible to majoritarian taint. *See* Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54

Mercer L. Rev. 1669, 1712 (2003). Thus it is perfectly natural that Justice Brennan, even in dissent in *Lynch*, took it as a given that courts will have to struggle to disentangle themselves from ingrained majoritarian habits of response in order to declaim of municipal creches: "[t]his case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable." *Lynch*, 465 U.S. at 696 (Brennan, J., dissenting).[6] Ironically, one of the reasons the *Lynch* majority gave for rejecting a standard that would produce a brighter line is a factor that grows more salient daily and which should have cut the other way – the diversity and pluralism of American society. *Id.* at 678.

Perhaps it is not entirely unsurprising that the reasonable observer standard would legitimate the display of a creche (*Lynch*), of a menorah adjacent to a Christmas tree so huge it dwarfed the menorah (*Allegheny*), and of a Christmas tree itself (*Allegheny*). The Court undertook, it said, to determine whether a reasonable observer would find endorsement – not of a particular sect, but of *religion* – but the question it actually posed to itself in *Lynch* was whether displaying the creche would be perceived by its reasonable observer as conferring a *benefit* on religion. *Id.* at 683. Conferring a benefit is not, of course, the same thing as giving an endorsement or intermingling the

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[6] The words recall those of Justice Jackson, who anticipated the public opprobrium the Court would face in curtailing the majority's preference for a compulsory flag salute: "This case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." *Barnette*, 319 U.S. at 641.

messages of the government and the religious symbol.[7] The Court concluded, having framed the question in these terms, that no more "benefit" was conferred by placing a creche in a city park than by allowing religiously themed paintings to hang in state galleries. *Id.*

But framing the analysis in such terms not only misses the point, but also trivializes the extent to which adherence to a religious creed has been made relevant to standing in the political community. The appropriate question in a display case involves not "benefit" but rather, the existence of the sort of symbolic unity between church and state that the Establishment Clause proscribes. Another way of saying this is in *Lynch/Allegheny* terms; namely, the government cannot welcome only the religiously inclined as citizen/insiders.

As Justice Brennan observed in his *Lynch* dissent:

> The primary effect of including a nativity scene in the city's display is ... to place the government's imprimatur ... on the particular religious beliefs exemplified by the creche. Those who believe in the

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[7] The Court has very clearly distinguished between conferring benefits such as aid to parochial schools and taking action that symbolically links government and religion. That is the whole point of post-*Lynch* cases such as *Agostini*, 521 U.S. at 227-32, partially overruling *Grand Rapids v. Ball*, 473 U.S. 373, because *Grand Rapids* had presumed that a financial benefit was coterminous with symbolic union, and *Mitchell v. Helms*, 530 U.S. 793 (2000). In fact, the "benefit" question is perfectly appropriate for school-aid cases but quite jarring for any other species of Establishment Clause case.

> message of the nativity receive ... .unique and exclusive ... public recognition and approval of their views. ... The effect on minority religious groups, as well as those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It [is] precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit.

465 U.S. at 701. Justice Brennan concluded that "[t]o be ... excluded on religious grounds by one's elected government is an insult and an injury." *Id.* at 709. An insult and injury to nonadherents would persist even if a court were to determine that, as in *Lynch*, no "benefit" of cognizable proportions was conferred on religion.

Simultaneously with its marginalization of nonadherents, the reasonable observer standard invites courts to exalt "history"–whatever they perceive it to be. Even judges whose decisions favor religious displays sometimes understand that the standard seduces some courts into obscurantism. *See, e.g., American Jewish Cong. v. City of Chicago*, 827 F.2d 120, 131 (7th Cir. 1987) (Easterbrook, J., dissenting) ("It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying whether one display is really like another. . . .")

Judge Easterbrook might have wondered as much about the uses of extrinsic forensic history in Establishment Clause cases as about experts dueling over

reindeer-to-creche ratios. There is obviously nothing wrong with, *e.g.*, courts taking account of various incarnations of the religion clauses that differed from James Madison's first draft. Straightforward historical inquiry often yields straightforward answers. The problem is that courts fail to realize that forensic history as used by legal advocates has no resemblance to historical study as practiced by scholars. The courts' too-frequent indulgence of deeply subjective "historical" analysis as part of the reasonable observer inquiry proves the wisdom of Samuel Butler's quip, "God cannot alter the past, historians can; it is perhaps because they can be useful to Him in this respect that He tolerates their existence." Samuel Butler, *Erewhon Revisited* XIV. Indeed, Butler might have noted that God might have particular uses for historians in judicial robes.

The dissenting opinion in the case below typifies the problem: after railing about *Lemon v. Kurtzman*'s "purpose" prong as a means of "psychoanaly[zing] legislators," *ACLU v. McCreary County, et al.*, 354 F.3d 438, *reh'g en banc denied*, 361 F.3d 928 (6th Cir. 2004), it proceeds to cobble together a variety of anomalous or elliptical remarks from Washington and Jefferson tending to show their (or in Washington's case, at least ghostwriter Alexander Hamilton's) religiosity, notes that Congress in 1782 issued a Thanksgiving proclamation urging supplication to the almighty, makes the obeisance required of its genre to de Toqueville's observation in *Democracy in America* that Americans view freedom and Christianity as linked, and swoops in for the *coup de grace*, pronouncing (with no particular authority that would withstand rabbinical or objective secular historians'

scrutiny) that the Ten Commandments played a "foundational role in American law and government." *Id.* at 461-71 (Ryan, J., dissenting).

It scarcely matters if Washington's farewell address or Jefferson's inaugural address extolled the virtues of religion. This may tell us something about their private views, or then again, it may tell us only about their political instincts. One's religious predilections and one's constitutional views may be entirely separate. Even if every delegate to the Constitutional Convention were in the habit of reading Exodus and Deuteronomy daily, it does not follow that delegates would have seen no harm in enshrining the Decalogue as national law. Even if Thomas Jefferson borrowed Blackstone's reference to "the Laws of Nature and Nature's God," this hardly proves that Jefferson was other than a Deist–it does not mean that he would share, *e.g.*, Roy Moore's view of the Biblical "Creator God" discussed in repetitive lawsuits involving Mr. Moore–let alone that a phrase from the Declaration of Independence in common use in 1776 has any bearing on the Establishment Clause. Even if it were a fact that every one of the Framers believed that Jesus is divine and that those who disagree are hellbound, this would be irrelevant, because the Establishment Clause could not countenance this fact. *See Allegheny*, 492 U.S. at 605 n.55 (quoting *Wallace v. Jaffree*, 472 U.S. at 52).

Litigants as well as judges may invoke "history" and original intent to suit the result they wish to reach; "history" confers a patina of legitimacy on many dubious claims. But such uses of history are polemical, not scholarly. Claiming the mantle of history conveys an

impression that accurate and dispassionate archival work has been undertaken and the truth has been excavated. When shibboleths or nubbins of Jefferson's writings at odds with his status as author of the Virginia Statute for Religious Freedom are repeated often enough by allegedly impartial purveyors, their publicists hope that such repetition will make them accepted truths, and that legal and cultural understandings will be changed to reflect the "new" historical "reality."(*See, e.g.*, Br. of the United States at 7-16.) Since layer upon layer of apocryphal sedimentation builds up each time one of these misleading arguments is made, sooner or later the shifting sands of myth, manufacture, or conjecture will take on the solidity of stone. Grave-robbing and posthumous psychoanalysis of persons long dead is a strange way to construe a law for today, all the same.

Of course, those who call on history for justification of majoritarian prejudices should not be surprised when history answers. This Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), demonstrates the malleability of "history." *Lawrence*, in overruling a case decided just 17 years earlier, *Bowers v. Hardwick*, 478 U.S. 186 (1986), also overruled a rationale that depended almost entirely on what *Bowers* purported was an authoritative exegesis of sodomy laws predating even Blackstone. *Lawrence* concluded that *Bowers* was simplistic, that its "historical premises [were] not without doubt and, at the very least, [were] overstated." *Lawrence*, 539 U.S. at 571. Thus, in less than two decades, this Court's own understanding of history–history back to the time of Leviticus–was radically rewritten.

III. THE REASONABLE OBSERVER STANDARD IS INSUFFICIENTLY SENSITIVE TO THE SYMBOLIC UNION OF CHURCH AND STATE WORKED BY PUBLIC DISPLAYS.[8]

Nor are the defects of the "reasonable observer" standard exhausted by discussion of its pejoration of nonadherents and its susceptibility to manipulation in the

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[8] *Amici* by no means suggest that the separate *Lemon* test should be overruled or modified. *See Lemon v. Kurtzman*, 411 U.S. 192 (1973). Indeed, *amici* note that courts often gloss past the part of the "reasonable observer" standard that addresses "what viewers may fairly understand to be the *purpose* of the display." *See Allegheny*, 492 U.S. at 522 (O'Connor, J., concurring) (emphasis added). *Lemon* is a useful reminder that government's purpose matters, and is particularly instructive for the two display cases pending here: one in which government sought through retrospective subterfuge to sanitize a display already ruled unconstitutional (*this case*), and one in which a stone monument was erected as part of the Fraternal Order of Eagles' campaign to persuade governments to outfit public parks and buildings with Ten Commandments plaques and monuments, ostensibly to deter juvenile delinquency (instead of, for example, to distribute juvenile justice codes in schools or to start after-school programs) (*Van Orden*). *Lemon* probes governmental motivations without distraction, and neither *Lemon* nor ancillary cases dealing with sham purpose or government's usage of a religious symbol where a secular one would serve government's articulated purpose should be discarded. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (sham purpose); *Lynch*, 465 U.S. at 681 n.7 (Brennan, J., dissenting) (choice of religious means over secular alternative). Assuming that there could be a display case in which purpose were not an issue, however, the standard suggested in Part IV of this brief would be easier to apply than *Lemon*, which after all was not crafted in the display context but in a school-aid case.

hands of the forensic historiojurist. While some courts do reach sound decisions even applying a standard that is both tacitly freighted to favor religion and amorphous,[9] the decisional process can be tortuous.

The two Decalogue cases pending here should be judged by the answer to the simple question of whether the display works a symbolic union of government and religion. This question does not require the cogitative peregrinations demanded by the reasonable person standard. The displays in each case are plainly unconstitutional if the factor for which we are testing is symbolic union that reinforces the faithful and alienates everyone else. Cramped spelunking into ill-fitting museum analogies and projection of majoritarian religious bias onto the reasonable observer who functions as a judge-penitent are distractions from this central question.

The dissimilarity in the physical arrangement of the religious symbols in *Van Orden* and this case and the differing results reached by the courts below highlight the circuity of the reasonable observer route. The *Van Orden* display is widely disaggregated, while the display here is a congeries. The Fifth and Sixth Circuits, like their sister circuits in other Decalogue cases, parsed the minutiae of physical arrangements and tried to negotiate the conundrum.

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[9] *E.g., Indiana CLU v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001). Notably, in addition to its reasonable observer analysis, that court focused extensively on whether a planned 11,500-pound stone Decalogue would effect a "symbolic union of church and state" signaling approval to adherents and disapproval to nonadherents. *See* 259 F.3d at 771-72.

In the cases whose physical settings most closely resemble that of *Van Orden,*[10] the courts have devoted extended discussion to whether the setting is "museum-like," which quality legitimated *Lynch*'s creche. *See* 465 U.S. at 676-77 ("The National Gallery in Washington, maintained with Government support ... has long exhibited masterpieces with religious messages. ..."). The analogy was inapt in *Lynch* and remains so. Government museums provide a forum for a variety of artistic representations without endorsing any. A Dutch master's work might hang adjacent to a Russian icon or "The Last Supper" – or any of these works could hang on a museum wall as its sole adornment without sending a message of governmental approval.

The court below noted the disparity in function between a museum and a courtroom and cogently explained another reason that the metaphor is anomalous.

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[10] Not coincidentally, these cases involve displays in which the Fraternal Order of Eagles persuaded government to donate public space for the FOE's gifts of Decalogues. *See O'Bannon*, 259 F.3d 766 (Decalogue monument to be placed on grounds of complex of civic buildings spanning two acres and containing a dozen separately spaced monuments); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003) (monument was to be placed on Capitol grounds near other government buildings, near the road, and was particularly prominent due to proximity of "floral clock"); *ACLU v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated by and reh'g en banc granted by*, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004) (Decalogue in large city park, not near government buildings, and monument stood alone). The FOE's campaign on behalf of governmental Decalogue displays is detailed in the original *Plattsmouth* opinion.

Citizens come to courthouses to obtain enforcement of the laws; they are rarely there other than "by necessity – whether they are on trial for a crime, have been subpoenaed as witnesses, are seeking to vindicate their civil rights, have been called to jury duty or are simply contesting parking tickets, registering to vote or renewing their driver's licenses. County courthouses also exude a coercive pressure, ranging from compulsory jury service to bench warrants to judicial decrees." 354 F.3d at 461. Museums share none of these attributes.

The Seventh Circuit, considering the museum analogy where various statues and monuments occupy not city parks but core municipal buildings or grounds of government offices, noted that even if a multiplicity of statues rendered the grounds arguably "somewhat akin to a museum," any conclusion that this neutralized the religious meaning of the Decalogue was wrong. It concluded, "This is not some museum nestled in some secluded park. The grounds, which house, among other things, the Capitol, the Governor's office, the General Assembly, the Indiana Supreme Court, and the Indiana Court of Appeals, is the seat of Indiana government." *O'Bannon*, 259 F.3d at 772. Such "displays at the seat of government [merit] particularly careful scrutiny" because they "run[] a special risk of making religion relevant, in reality or public perception, to status in the political community." *Id.* (citing *Allegheny*, 492 U.S. at 626 (O'Connor, J., concurring)). *Accord Adland*, 307 F.3d 471. *See also ACLU v. McCreary County*, 361 F.3d 928, 932 (order denying rehearing *en banc*) (6th Cir. 2004); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000);

American Jewish Cong. v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987).

In *Van Orden*, the monument is not only on the grounds of the seat of government, but it was approved by the Fifth Circuit because it is "at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building. It is plainly linked with those houses of the law ..." 351 F.3d at 181. This, of course, is a significant reason that the monument should not be sustained, as the Seventh Circuit would have held on *Van Orden*'s facts, to judge from its reasoning in *O'Bannon*.

Blatant symbolic conflation of divine law and man's law is prohibited. This conflation is also why the staging of the Bill of Rights, a few documents from historical figures or Congress referencing wholly religious matters, and the Ten Commandments in a putative "Foundations of Law" display in courthouses and schoolhouses was rightly prohibited by the panel below in *McCreary*.

Courts that instinctually reach toward the symbolic union question as the heart of the matter recognize that it is not metaphors but effects that count. When government deliberately places its own secular texts or symbols prominently with religious texts or symbols, it is not constructing an innocuous exhibit that neutralizes the message of the religious artifacts. Far from secularizing the religious symbols, it is identifying the most cherished emblems of its statehood with the religious message. *See McCreary*, 354 F.3d at 460; *O'Bannon*, 259 F.3d at 773 (where Bill of Rights and Indiana Constitution's Preamble referencing "Almighty God" are placed with sacred texts,

this "signals that the state approve[s] of such a link and [is] sending a message of endorsement"); *Books*, 235 F.3d at 307 (FOE Decalogue topped by American eagle gripping the national colors in its talons symbolically equates government and religion and is thus an endorsement); *ACLU v. Ashbrook*, 375 F.3d 484, 494 (6th Cir. 2004) ("[b]y placing the Decalogue in apparent equipoise with the Bill of Rights" the state creates the impression that it equates civil law with a divine code); *Adland*, 307 F.3d 471 (monument on Capitol grounds featuring American flag in the eagle's talons along with the Decalogue, Chi and Rho, and the all-seeing eye of Providence impermissibly links government and religion); *Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1987) (Latin cross surrounded by symbols of city on municipal seal forged symbolic link between Christianity and government). The cases just referenced reached the right results because they, unlike *Van Orden*, asked the right question.

IV. JUSTICE STEVENS HAS PROPOSED A BETTER APPROACH THAN THE REASONABLE OBSERVER STANDARD.

As explained above, the reasonable observer standard tempts courts to ask the wrong questions and ratifies implicit biases toward "mainstream" monotheistic religions. It is, moreover, so unstructured that it confuses those who must apply it. Of *Allegheny*'s counterintuitive conclusion that one religious symbol could secularize another in the reasonable observer's eyes, Justice Brennan remarked:

> I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. ... But I shudder to think that the only 'reasonable observer' is one who shares the particular views on perspective, spacing, and accent expressed in [the majority's] opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.

492 U.S. at 643 (Brennan, J., dissenting).

Justice Stevens has proposed a baseline rule that respects core Establishment Clause values and which would inject clarity. He would "create a strong presumption against the display of religious symbols on public property." *Allegheny*, 492 U.S. at 650 (Stevens, J., dissenting). This presumption would "prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular." *Id.* at 652.[11] In other words,

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[11] This formulation is perhaps more permissive than Justice Brennan's would have been. *See id.* at 637 (Brennan, J., dissenting) ("I continue to believe that the display of an object that 'retains a specifically Christian' [or other] religious meaning ... is incompatible with the separation of church and state demanded by the Constitution") (internal citations omitted); *id.* at 643 (stating that the Court's recognition that "the menorah is a religious symbol" "should have been the end of the case"). While *amici* agree with Justice Brennan, they realize that the Court is unlikely to do so here.

Justice Stevens would ask whether the religious and civil messages are impermissibly linked. His presumption would screen for the symbolic union the Constitution forbids, leaving unmolested friezes that commemorate not great proselytizers but great lawgivers even if Moses is depicted among them, *id.* at 652-53, while it would proscribe "a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall." *Id.* at 652. His presumption would also proscribe a courtroom carving of Moses, Confucius and Mohammed because such a display would honor religion as surely as would the erection of a "Latin cross on the roof of city hall." *Id.*

Justice Stevens' suggestion should not be rejected out of hand as "hostile to religion," because as just demonstrated, it is hostile only to endorsements of religion, which should be unobjectionable. Justice Stevens' presumption would be raised only in the display arena; it would not bar the *study* of the Ten Commandments in public schools, but merely prevent their posting on a schoolhouse wall with no evident secular context. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (contemplating that Commandments may be integrated into a study of history, civilization, ethics, or comparative religion even though they may not be posted on schoolhouse walls). The Court is free to employ whatever hypothetical constructs it thinks useful to lower courts in assessing the application of the presumption in particular cases; the existence of the presumption as a starting point would no doubt render any factors the Court would choose more clear than the present "reasonable observer" standard.

Adoption of Justice Stevens' presumption would be fair to all citizens in refusing to permit the organs of government to be appropriated by aspiring theocrats. It would greatly aid in depoliticizing the Establishment Clause, which was designed to withdraw rights of conscience "from the vicissitudes of political controversy." *Barnette*, 319 U.S. at 638. It would mark an improvement in judicial understanding of what symbols mean, politically and religiously. This Court should, accordingly, revisit Justice Stevens' dissent in *Allegheny* and consider the evident as well as the latent flaws of the current standard discussed by *amici*.

CONCLUSION

The Constitution's solicitude for "constitutional people" who do not believe in deity is subverted by a reasonable observer standard which subtly incorporates or ratifies "mainstream" monotheistic assumptions. This renders these constitutional people, too often, constitutional strangers. The Court's current standard fails to appreciate how actual nonhypothetical citizens react when government communicates through symbols. Religious symbols in or near core government buildings are particularly evocative because they marry the visual majesty of government to those religious symbols. This Court should adopt a standard that is equal to the aspiration of treating religious adherents and nonadherents exactly the same.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 21 2005
OFFICE OF THE CLERK

No. 03-1693

In the
Supreme Court of the United States

McCreary County, *et al.*
Petitioners,

v.

ACLU of Kentucky, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

Brief of Baptist Joint Committee, American Jewish Committee, American Jewish Congress, and The Interfaith Alliance Foundation, as Amici Curiae in Support of Respondents

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QUESTION PRESENTED

Whether government may display a sacred text if it surrounds that text with patriotic texts and makes conclusory assertions that the sacred text has secular significance parallel to that of the patriotic texts.

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INTEREST OF THE AMICI

The amici joining in this brief are Christian, Jewish, and interfaith religious organizations. These amici are concerned about the religious liberty of all persons, *and* about government undermining true religious faith by using religion for political purposes. This case is one of many in which government displays a sacred text, and then distorts that text and diminishes its religious significance by claiming that the text is primarily secular in purpose and effect.[1]

The Baptist Joint Committee is a religious liberty organization serving fourteen cooperating Baptist conventions and conferences in the United States. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

The American Jewish Committee, a national organization of over 150,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, the Committee filed an amicus brief opposing mandatory display of the Ten Commandments in Kentucky public schools in *Stone v. Graham*, 449 U.S. 39 (1980), where the Court recognized the religious nature of the Ten Commandments, stating that "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* at 41. The Committee also recently filed an amicus brief in

[1] This brief was prepared entirely by counsel for amici. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. This brief is filed with consent of all parties. Respondents' consent is on file with the Clerk; Petitioners' consent is submitted with the brief.

Van Orden v. Perry, No. 03-1500, opposing the display of the Ten Commandments on the grounds of the state capitol in Texas. The Committee accordingly joins in this brief in opposition to the public display of the Ten Commandments in courthouses, where citizens of many faiths and of no faith convene daily to seek justice.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, and religious rights of American Jews. It has taken a particular interest in the protection of the rights guaranteed by the Establishment Clause, including all of the cases reaching this Court concerning religious displays.

The Interfaith Alliance Foundation is a unit of The Interfaith Alliance, an interfaith group of 150,000 people of faith and goodwill, from seventy different faith groups, working to promote interfaith cooperation around shared religious values and to strengthen the public's commitment to the American values of civic participation, freedom of religion, diversity, and civility in public discourse.

SUMMARY OF ARGUMENT

We incorporate by reference the brief of the Baptist Joint Committee *et al.* in *Van Orden v. Perry*, No. 03-1500. That brief argued that governments are rebuttably presumed to endorse what they display, and that when government displays a sacred text, it must rebut the presumption of endorsement by objective evidence that gives the entire display a secular meaning that dominates any religious meaning and is independent of any religious views about the sacred text. In this brief, we apply that standard to the facts of this case.

The court of appeals opinion is a straightforward application of this Court's opinion in *Stone v. Graham*, 449 U.S. 39 (1980). Neither *Stone* nor the opinion below explicitly announced a general presumption that government

endorses what it displays. But each court found it obvious on the facts before it that a bare display of the Ten Commandments endorsed the Commandments. And each court recognized the possibility that the Commandments might be integrated into a genuinely secular message. The opinion below gives meaningful content to the requirement of integration into a secular message; in the approach of this brief, the opinion below elaborates what is required to rebut the presumption that government endorses what it displays.

The court of appeals required a "demonstrated analytical or historical connection" between the Commandments and the rest of the display. *ACLU v. McCreary County*, 354 F.3d 438, 451, 453 (6th Cir. 2003). Without such a requirement, *Stone*'s requirement that the Commandments be "integrated" into a secular message would be meaningless. Government could display a sacred text and surround it with any random collection of secular documents. The United States says that a display may be "uncommonly silly or disunified" and still be constitutionally valid. U.S. *McCreary* Br. at 21 n.11. Of course governmental silliness is not unconstitutional. Governmental display of a sacred text is what establishes religion. But silliness cannot rebut the presumption of endorsement or carry the government's burden of showing that the sacred text has been integrated into a secular message.

The history of earlier displays in these counties is relevant for similar reasons. Of course the counties are free to correct earlier unconstitutional behavior. But here, the unconstitutional behavior consisted of sending a message endorsing a sacred text, and any corrective action must actually succeed in changing the message. The counties' persistent efforts to display the Ten Commandments undermines the credibility of alleged secular messages.

Here, the asserted secular message is not really secular. The counties make explicit and controversial claims about the significance of a sacred text. Government must be neutral in religious disputes, and disputes about the meaning

or significance of passages in sacred texts are squarely within that obligation of neutrality.

The counties' attempt to rationalize their display of the Ten Commandments make their endorsement more explicit and more specific. The counties' claims about the importance of the Commandments in American law and in the foundation of the country are endorsements both of the Commandments and of a particular, secularized view of the Commandments. We believe these claims are objectively inaccurate, but it is enough that they are controversial and that they concern a sacred text.

The counties' claim of legal significance for the Commandments do not focus on the Commandments against killing, stealing, and false witness, which at least correspond to elements of American law. Instead, the counties equate the Commandments with documents associated with the growth of Anglo-American liberty, and particularly assert that their influence is clearly seen in the Declaration of Independence. But the Commandments say nothing about liberty. And the Commandments' understanding of law as handed down by God is fundamentally inconsistent with the Declaration's theory that law is made with "the consent of the governed." The Commandments and the Declaration can be reconciled only by clearly distinguishing religious obligations from civil obligations -- by separating church and state.

Restricting government endorsements of religion, and requiring a clear, secular message to rebut the presumption of endorsement, is not hostile to religion. Rather, it protects each religious tradition from government-sponsored competition. When government attempts to rationalize its display of sacred texts by claiming secular purposes and secular effects, the inevitable tendency is to distort and desacralize the sacred text. Excluding the government from endorsing controversial propositions about sacred texts protects the liberty of each faith tradition to interpret its own sacred texts and to promote its own religious understandings.

ARGUMENT

I. The Counties Bear the Burden of Rebutting the Presumption That They Endorse What They Display.

We incorporate by reference the brief filed by some of these same amici in *Van Orden v. Perry*, No. 03-1500 (Brief of Baptist Joint Committee *et al.*, hereinafter cited as BJC *Van Orden* Br.). In that brief, we argued that the state is rebuttably presumed to endorse what it displays, *id.* at 3-5, and that when it displays a sacred text, it must rebut the presumption of endorsement "by objective evidence, clearly visible at the site of the display, that negates any appearance of endorsing the religious sentiment and gives the entire display a secular meaning that dominates any religious meaning." *Id.* at 30.

We argued that this standard is implicit in this Court's cases, *id.* at 4-5, and that it is necessary to prevent endless ad hoc litigation, *id.* at 5-7. We argued that in such litigation, government officials systematically attempt to desacralize sacred texts, repeatedly claiming that these sacred texts are primarily secular in purpose and effect, thus interfering with the constitutionally protected efforts of each faith group to promote its own interpretation of its own sacred texts. *Id.* at 7-10.

We argued that Texas's efforts to portray the Ten Commandments as secular were clearly insufficient to rebut the appearance of endorsement. *Id.* at 10-23. We showed that those few Commandments that are part of American law -- the Commandments against killing, stealing, and false witness -- were part of Anglo-Saxon law before the Anglo-Saxons learned of the Commandments, and that they were part of other ancient legal systems uninfluenced by the Commandments. *Id.* at 20-23.

We argued that most of the possible ways to rebut the presumption of endorsement can be specified. "A sacred text may be a necessary and integrated part of an explicit secular message that is objectively neutral with respect to the

content of the sacred text." *Id.* at 24-26. Or the government may use religious language in *de minimis* ways for secular purposes, *id.* at 26-28, as outlined by Justice O'Connor in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2323-27 (2004). Or the government may use brief quotations from religious sources with meanings equivalent to some secular sentiment appropriate to the context where the quotation is used. BJC *Van Orden* Br. at 29-30. The Ten Commandments as displayed in this case fall in none of these categories.

We will not repeat the earlier brief here. In this brief, we apply the proposed standard to the facts of this case. The counties' efforts to evade the Establishment Clause clearly do not rebut the presumption that they endorse what they display. Instead, those efforts make the endorsement more specific and more explicit.

II. The Court of Appeals' Opinion Simply Requires the Counties to Negate the Appearance That They Endorse What They Display.

A. The Court of Appeals Properly Required a "Demonstrated Analytical or Historical Connection".

The United States vigorously attacks the court of appeals' statements that the counties' displays failed to show an "analytical or historical connection" between the Ten Commandments and the rest of the displays. Compare *ACLU v. McCreary County*, 354 F.3d 438, 451, 453 (6th Cir. 2003); with U.S. *McCreary* Br. at 19. But the court of appeals did not require such a connection in a vacuum. Having found that the counties displayed a sacred text and appeared to endorse it, the court of appeals considered what kinds of evidence might negate that appearance of endorsement.

The opinion of the court of appeals is a straightforward application of this Court's opinion in *Stone v. Graham*, 449

U.S. 39 (1980). *Stone* is consistent with an implicit presumption that government endorses what it displays, *see* BJC *Van Orden* Br. 4-5, and therefore that government bears the burden to rebut the presumption of endorsement. *Stone* acknowledges that the Commandments may be "integrated into the school curriculum," 449 U.S. at 42 (and any public school curriculum would of course have to be secular). The court of appeals properly expanded this example beyond school curricula, but it retained *Stone*'s essential requirement of "integrat[ion]" into a secular message. Thus it properly read *Stone* as holding that justification for governmental use of the Ten Commandments requires government to "present the Ten Commandments objectively and integrate them with a secular message." 354 F.3d at 448. In this brief's parallel and more explicit formulation, integration with a secular message would rebut the presumption of endorsement.

The court of appeals' requirement of "a demonstrated analytical or historical connection with the other documents," *id.* at 451, *accord* at 453, is essential if *Stone*'s requirement of integration into a secular message is not to be rendered illusory. Unless such a requirement is seriously enforced, government would be able to display any religious message it chooses merely by displaying some secular message nearby. This appears to be the position of the United States, which insists that there need be *no* connection between the sacred text and the other elements of the display: "The fact that a display is uncommonly silly or disunified does not render it an establishment of religion." U.S. *McCreary* Br. at 21 n.11; *see also id.* at 29 (claiming that a valid display may be "thematically disjointed" and "a muddle").

Of course silliness and disunity alone do not establish religion. In the secular realm for which it is responsible, government may do many silly things without violating the Constitution. It is government display of a sacred text that establishes religion. The relevance of silliness and disunity is that they do nothing to rebut the appearance that government endorses what it displays. Silliness and disunity

can not establish a clear secular message that subsumes the religious message that is explicitly displayed. Silliness and disunity in fact reinforce the presumption of endorsement; they suggest that government cared only about displaying the sacred text, and gave little thought to the rest of the display. But it is not even necessary to draw that inference. Once it is recognized that persons who post signs generally endorse the content of those signs, then a government that displays a sacred text is presumed to endorse that text, BJC *Van Orden* Br. at 3-4, and government bears the burden of rebutting that presumption. Silliness and disunity cannot carry the government's burden.

The cases on which the United States relies do not suggest that government may display unexplained and apparently unrelated conjunctions of religious and secular symbols. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), it was obvious that all the symbols displayed related to Christmas as it has come to be celebrated in the United States. This relationship required no explanation, but the large "Seasons Greetings" sign clearly labeled the entire display. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the decisive votes, with somewhat different emphases, plausibly interpreted the display of a Christmas tree, a menorah, and a salute to liberty sign as a tribute to religious pluralism. *See id.* at 613-21 (Blackmun, J.); *id.* at 632-37 (O'Connor, J.). Symbols of two holidays of two different religions, falling at approximately the same time, required little explanation, and the salute-to-liberty sign put the emphasis on liberty to choose among the multiple traditions represented in the display. In each case, the unifying theme was sufficiently apparent to require little explanation.

Neither *Lynch* nor *Allegheny County* suggests that a government-sponsored religious display can be constitutionally validated by unrelated or tenuously related secular displays nearby. Moreover, as explained in our earlier brief, nonverbal symbols are subject to a broader range of interpretations; government displays of sacred texts

should be held to a higher standard. *See* BJC *Van Orden* Br. at 5 n.3. *Lynch* and *Allegheny* are readily distinguished both by the inherent ambiguity of nonverbal displays and by the straightforward relationship between the religious and secular symbols displayed in those cases. Neither case approaches the facts here, in which government expressly promulgates specific religious propositions quoted from a sacred text.[2]

The other example offered by the United States is that coins do not explain the relationship between "In God We Trust" and the depictions of Monticello or Abraham Lincoln. Of course no such relationship exists to be explained; the motto on the coins is not an example of a religious text "integrated" into a secular message. The motto on the coins is an example of a completely different doctrinal category, the *de minimis* use of religious language for secular purposes, explained and developed by Justice O'Connor in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2323-27 (2004). For the reasons explained in our

[2] The same two factors distinguish the depictions of Moses with the Commandments on two friezes of the Supreme Court building. These friezes are nonverbal displays with no visible English text of the Commandments, and Moses is grouped with other famous lawgivers, both religious and secular, including lawgivers from cultures outside the Jewish and Christian traditions. *See* Office of the Curator, Supreme Court of the United States, *Courtroom Friezes: North and South Walls*, at www.supremecourtus.gov/about/north&southwalls.pdf; Office of the Curator, Supreme Court of the United States, *The East Pediment*, at www.supremecourtus.gov/about/eastpediment.pdf. The Court could not plausibly be thought to endorse each of the great variety of legal codes symbolized in these friezes. Indeed, some of these codes, such as those of Draco and Lycurgus, were harsh, authoritarian, and repugnant to American sensibilities. In context, the friezes are an artistic and architectural means of symbolizing law and the role of this Court, with no implied endorsement of all that is depicted. And unlike the displays at issue here, the friezes make no specific claims about the meaning or significance of the Commandments.

earlier brief, the Ten Commandments clearly do not fit in that category. BJC *Van Orden* Br. at 26-28.[3]

B. The Court of Appeals Properly Relied on the Counties' Earlier Displays.

Petitioners and the United States also complain of the court of appeals' reliance on the history of earlier displays of the Ten Commandments at the same sites. *ACLU v. McCreary County*, 354 F.3d 438, 455-58, 461 (6th Cir. 2003). These parts of the opinion were entirely proper, with or without a presumption that the counties endorse what they display. But such a presumption would further strengthen and explain these parts of the opinion.

The counties began with bare displays of one version of the Ten Commandments on their courthouse walls. *Id.* at 441-42. After the counties were sued, they added excerpts from various patriotic documents. *Id.* at 442. After those displays were enjoined, the counties modified the mix of patriotic documents, displayed entire documents rather than excerpts, and added attempts to explain how the Ten Commandments related to these other documents.

The original bare displays of the Ten Commandments obviously endorsed the Commandments; there is no basis, however strained or attenuated, to argue for any other interpretation. This bare endorsement is what the counties displayed when they thought they were free to say what they really thought; all subsequent additions to these displays were in response to litigation. A reasonable observer watching these incremental additions would see the counties scrambling to preserve their endorsement of the Commandments, searching for the minimum amount of secular content and secular rationalization to preserve the displays. The reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Here that history was entirely public and recent, and its one continuous feature was the counties' persistent effort to display the Ten Commandments.

This history inevitably makes it more difficult for the counties to rebut the presumption that they endorse what they display. They must integrate the Commandments into a clear and explicit secular message, but the history of what they have displayed undermines the credibility of any secular additions to the message.

Of course a county that violates the Constitution is permitted to make corrections and comply with the Constitution thereafter. But the "corrections" must actually correct the violation. Where the violation consists of sending a message, corrections must actually change the message, and sometimes, that may be difficult. Here, the publicly known history of the counties' efforts to endorse the Commandments continues to be part of the message. Negating that endorsement requires a clean break, an unambiguously secular message, and an unambiguously secular integration of any religious material included in that

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[3] Petitioners' discussion of Justice O'Connor's test in *Newdow*, Pet. Br. 40-47, is not recognizable as the same test. Instead of asking whether a particular practice has a long and ubiquitous history, petitioners would ask "whether history reveals that a practice has established or tended to establish a religion." *Id.* at 42. Petitioners expressly reject the factor of absence of worship or prayer. *Id.* at 43-44. They interpret "absence of reference to particular religion" to permit quotation from a particular religion's sacred texts. *Id.* at 45. They interpret "minimal religious content" to mean only that the words "God" and "Lord" must be surrounded by a much larger number of other words. *Id.* at 45. They thus fail to count most of the religious content, and they would apparently permit any absolute amount of religious content so long as it were surrounded with a larger amount of secular content.

The strength of Justice O'Connor's proposed test is to define a relatively objective boundary to a permissible category of *de minimis* uses of religious language. The test will quickly become useless if its factors are expanded and manipulated.

message. As explained below, the counties have not come close to negating their religious message. But if this case were closer -- if the new displays made a better pretense of integrating the Commandments into a secular message -- the message sent to the reasonable observer would necessarily have to be understood in light of the history of these displays and the counties' persistent efforts to endorse the Commandments.

Disregarding the history of these displays is also a formula for endless litigation. The counties can endlessly tweak their displays, claiming that every addition presents a whole new case or controversy that renders all prior versions of the displays irrelevant. This Court has rejected a similar litigation strategy before, in a similar context. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313-17 (2000). Governments cannot be allowed to perpetuate unconstitutional religious displays by repeatedly changing them to avoid final judgment.

C. Requiring a Clear Secular Message Is Not Hostile to Religion.

Requiring government to clearly communicate an explicit secular message does not treat religious symbols "as so inherently suspect as to require some sort of curative instruction." *See* U.S. *McCreary* Br. at 19. Religious symbols are not suspect; what is suspect is *government* display of religious symbols, and especially government display of sacred texts. What is required is not "a curative instruction," but a secular message that is independent of any religious view about the sacred text.

Necessarily, government must state that secular message clearly and explicitly. It has clearly and explicitly displayed the sacred text; the appearance of endorsement is clear, and to negate that appearance, the secular message must predominate. For the secular message to predominate, it must also be clear and explicit. The court of appeals properly required the counties to show that they had so

integrated the Commandments into a secular message that the resulting integrated message negated the appearance that the counties endorsed the Commandments themselves.

III. The Counties' Exaggerated Claims About the Legal Significance of the Commandments Endorse the Commandments and One Disputed View of the Commandments.

The counties cannot rebut the presumption that they endorse what they display simply by surrounding a sacred text with a miscellaneous selection of secular documents. Such a display might simply endorse all its disparate elements, or it might be gerrymandered to include a marginally relevant sacred text, or its message might depend on an essentially religious claim about the truth or significance of the sacred text. *See* BJC *Van Orden* Br. at 25-26. All these things appear to be true of the displays at issue here.

The Ten Commandments are the only religious document in displays of patriotic documents; the Commandments do not fit in any reasonable category with the remainder of the display. Such gerrymandering shows that the counties were determined to include the Commandments whether or not they were reasonably necessary or clearly relevant to the rest of the display. Such determination to include the Commandments despite their marginal relevance demonstrates a purpose to endorse the Commandments and has the effect of endorsing the Commandments. Such a gerrymandered display conveys no secular message to which the Commandments are an integral part, so it cannot rebut the presumption that the counties endorse the sacred text that they display.

More fundamentally, the counties' displays do not clearly communicate any secular message that is independent of religious beliefs about the Commandments. In their efforts to rationalize inclusion of the Commandments, the counties explicitly endorse both the Commandments and a particular

secularized view of the Commandments. The displays claim that:

> The Ten Commandments have *profoundly* influenced the formation of Western legal thought and the formation of our country. That influence is *clearly* seen in the Declaration of Independence, which declared that, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide *the* moral background of the Declaration of Independence and *the foundation* of our legal tradition.

354 F.3d at 351 (emphasis added). All that petitioners can now bring themselves to say about the most specific portion of this remarkable claim is that some of the Commandments "*are compatible with* the rights to life, liberty and happiness." Pet. Br. 10 n.7 (emphasis added). Petitioners insist that the counties' claims "need not be accurate." *Id.* at 10. The United States suggests a similar disdain for any requirement of accuracy when it suggests that a government display that validly includes a sacred text may be "uncommonly silly." U.S. *McCreary* Br. at 21 n.11.

As further explained below, we believe the counties' claims are wildly inaccurate. We think that no religiously neutral reasonable observer would accept the counties' view of the Commandments -- that only a prior commitment to rationalizing government display of the Commandments would induce any observer to take the counties' claims seriously. But accurate or not, the more fundamental point is that the counties' claims are *about the meaning and significance of a sacred text* and that the claims made about that sacred text are *controversial*. Just as government cannot take sides in controversies about religious faith, so it cannot

take sides in controversies about the significance or consequences of sacred texts.

Government discussions of religion must be religiously neutral, and in general, that will mean that government must confine itself to objective facts, readily verified. When government makes evaluative claims about a particular sacred text, it is taking sides in a religious controversy. That many observers find the counties' claims to be inaccurate is evidentiary of the more fundamental point that the counties' claims are at best highly debatable. The counties may of course make controversial statements, and even inaccurate statements, about secular matters within their responsibility. But they may not make controversial statements about a sacred text, because they may not take sides in religious debates.

When government claims that a particular sacred text is "the foundation of our legal tradition," it is endorsing that sacred text as especially important. And it is endorsing a particular view of that text, emphasizing its legal significance rather than its religious significance. The courts below thus got it exactly right when they said that the counties' efforts to rationalize and secularize their displays of the Commandments were in fact endorsements of the Commandments:

> The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement.

ACLU v. McCreary County, 354 F.3d at 458, quoting *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 851 (E.D. Ky. 2001).

We are not proposing either a heckler's veto or a presumption against any government statement that might in

any way reflect on religion. If the county museum explains that black churches played an important role in the civil rights movement, it is not enough that someone, somewhere might be found who disagrees with that statement. Such a statement would be readily verifiable by evidence that is ample, recent, and secular; it would principally be a statement about the political activities of identifiable individuals and groups of people; and most obviously, it would not be a statement about a sacred text. Where there is substantial and legitimate controversy about a sacred text, government should remain neutral.

Here, the counties make explicit claims about a particular sacred text, and the very best that can be said for those claims is that there is substantial and legitimate controversy about them. We believe that the counties' claims are grossly inaccurate and created for purposes of litigation. In our earlier brief, we addressed the claim that the Ten Commandments played a significant role in the development of American law, characterizing that claim as "wrap[ping] a kernel of truth in such a vast overstatement as to demonstrate that the statement is a pretext to justify displaying the Commandments." BJC *Van Orden* Br. at 20. What the counties claim here is even less plausible than what Texas claims.

The three Commandments that are reflected in modern American law are the Commandments against killing, stealing, and bearing false witness. *See id.* These appear in the criminal code, and in the common law tort of defamation; they do not appear in any of the nine secular documents included in the counties' displays. Thus the one plausible claim of legal significance for the Ten Commandments, as attenuated as it is, is not part of the counties' displays and has no relation to their displays.

The counties categorize the Ten Commandments not with bans on murder, theft, and perjury, but with documents associated with the rise of liberty: the Magna Carta, the Bill of Rights, the Declaration of Independence, and the

Preamble to the Kentucky Constitution. But nothing in the Commandments says anything about liberty.

Even more implausible is the counties' claim that the Commandments's profound influence on western legal though is "clearly seen in the Declaration of Independence." *If* the Commandments are conceived of as law,[4] then the Commandments and the Declaration reflect very different views of the sources and nature of law. In the Commandments, the authority of law comes down from above: law is dictated by God. But in the Declaration, the authority of law comes up from below: laws are made by governments "deriving their just powers from the consent of the governed." To claim that the Declaration shows the profound influence of the Commandments is to fundamentally distort both.

Of course millions of Americans revere both the Declaration and the Commandments, but not because one shows any influence of the other. Believing Americans can reconcile these documents by clearly distinguishing religious obligations from civil obligations -- *i.e.*, by separating church and state. The Commandments are religious obligations (or even, in some understandings, *religious law*), binding on the conscience of believers, and in the belief of many Christians and Jews, binding simply because God so commanded. But in the United States, the Commandments are no part of the law enacted by government, no part of the law enforceable by government, and of course, in no way binding on any persons who do not voluntarily accept their religious authority. The only law that is binding on all in the United States is law made by the consent of the governed

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[4] The Commandments were law when handed down, in an ancient Jewish society that had little or no concept of separation of church and state and did not distinguish religious from secular law. The Commandments are often referred to as part of "the law" even today in the Jewish tradition, but it is clear that this usage means religious law, not civil or secular law.

under constitutional processes operating through democratic institutions.

Recognizing and preserving this distinction between religious and civil obligations is not hostile to religion. Rather, it protects each religious tradition, and each American, from government-sponsored religious competition. These amici and their members have religious views about the Ten Commandments, and for the most part, these religious views are not the stated views of the counties. For amici's Christian and Jewish members, the Commandments are of profound religious importance, and emphasizing their attenuated connection to American law misses the fundamental point and distorts their religious significance. Persons of other faiths who are members of The Interfaith Alliance have a variety of views about the Ten Commandments. Members of The Interfaith Alliance are respectful of other religious traditions, but few find it plausible to believe that a particular sacred text of someone else's religion is the foundation of their nation's legal system.

When government displays a sacred text without note or comment, it endorses and supports that text and the religious traditions to which the text is sacred. When government tries to justify itself by explaining the significance of the sacred text, it takes sides in any controversies about the meaning and significance of the sacred text. Because government can display sacred texts only if it claims a secular purpose and effect, the tendency of its explanations is always to distort and desacralize the sacred text. The inevitable effect is that government supports only the religion of those who agree with both the sacred text and the government's secularized explanation of the text. Government puts itself in competition with the religion of all other Americans. Our Constitution excludes government from such religious competition -- for the protection of believers and nonbelievers alike.

CONCLUSION

The judgment should be affirmed. The opinion should make clear that government is presumed to endorse what it displays, and that when it displays a sacred text, government must clearly rebut the presumption of endorsement.

Respectfully submitted,

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January 21, 2005

(23)

No. 03-1693

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of *all* religious traditions, and the equal participation of religious people in public life and public benefits. Over its first decade, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and others in cases involving the full range of religious freedom issues under federal and state constitutional and statutory law.

Amicus submits this brief to highlight: (1) that American governments routinely – indeed, inevitably – include religious elements as one component of their cultural expression more broadly; and (2) that such government expression that acknowledges the contributions of America's many religions to its culture is time-honored, ubiquitous, and reflects the full and ever-expanding range of American religious diversity. Aware of this broader history and context, courts should treat such expression with deference in order to respect the increasing religious diversity that they reflect.

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[1] All parties have consented to the filing of this brief. A consent letter from Respondents is on file with the Court. A consent letter from Petitioners is being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

One can scarcely imagine a government that does not engage in some form of cultural expression, or a culture that does not have religion as a meaningful component. But even if one did exist, it would bear no resemblance to our government and culture.

American governments at all levels—federal, state, and local—engage in many forms of cultural expression, such as commemorating historical events, celebrating national heroes, and affirming the distinct contribution of its many ethnic groups. And because religious diversity and ferment is one of the distinguishing characteristics of American culture, government cultural expression routinely includes religious elements.

The purpose of this brief is to illustrate by examples the longevity, ubiquity, and diversity of the American tradition of allowing—rather than selectively excising—religious elements as part of government cultural expression.

This widespread pattern of government behavior does not represent the "endorsement" of any one religion or religion generally. Instead, it is simply the ongoing *recognition* and *acknowledgement* of the important role of America's many religions in its public life—activities that this Court routinely permits under the Establishment Clause.

In order to respect the flourishing of religious diversity that this government expression reflects, courts should review it with deference. Specifically, the reasonable observer should be deemed familiar with the broader phenomenon that ordinary cultural expression by government will frequently contain religious elements in a religiously diverse society. Displays like the one at issue here should be viewed as merely one religious patch in the broader—secular

and religious—cultural quilt of our society.

ARGUMENT

I. GOVERNMENT CULTURAL EXPRESSION IN THE UNITED STATES NECESSARILY AND LEGITIMATELY REFLECTS THE RELIGIOUS DYNAMISM OF AMERICAN CULTURAL LIFE.

The Constitution generally affords federal, state and local governments plenary control over their own speech, and makes them primarily accountable to the electorate—not the judiciary—for the positions they choose to express. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth,* 529 U.S. 217, 235 (2000); *Rust* v. *Sullivan,* 500 U.S. 173, 192-95 (1991).

Government speech often involves cultural expression, in the form of public monuments, memorials, festivals, and others. And in a society like ours, where religious freedom and diversity are such cherished values, the variety of religious views and the ensuing debate among them inform and energize the broader culture in meaningful ways. *See Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) (recognizing "the religious nature of our people," and that "the spiritual needs of man" give rise to a "wide . . . variety of beliefs and creeds"). *See also New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964) (noting "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").[2]

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[2] Tocqueville similarly recognized the breadth and depth of the influence of religion in American public life:

> "I am sure that [Americans] think [religion] necessary to the maintenance of republican

Accordingly, government cultural expression will often reflect at least some religious aspects of the culture. Indeed, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984).

Rather than require that these religious elements be targeted for special exclusion from government expression, our Constitution requires only that they not privilege one religion over others, or privilege the religious over the secular. *See Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). *See also Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

Thus, the Constitution allows government to *recognize* and *acknowledge* the role of religions in cultural life, so long as government does not *endorse* any one or all religions.[3] *See Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country"). *See also County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 601 (1989) (permitting government recognition of religious holiday as "a cultural phenomenon").

In short, if government is to mark and make room for cultural expression generally—and one can scarcely conceive of a government that does not—some government expressions will necessarily include religious elements. Such expressions are especially common in a vibrantly, religiously diverse society like ours. Accordingly, they are routinely permitted, subject to certain narrow limitations on the otherwise broad power of government to control its own message.

II. GOVERNMENT CULTURAL EXPRESSION IN THE UNITED STATES — HISTORICALLY, CURRENTLY, AND INCREASINGLY — REFLECTS THE FULL RANGE OF AMERICAN RELIGIOUS DIVERSITY.

Government cultural expression—in virtually every conceivable form—has included religious elements since the Founding. This phenomenon is not only long-standing and pervasive, but it has kept pace with the vast and ever-

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> institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks."

Alexis de Tocqueville, *Democracy in America* 293 (J.P. Mayer ed. 1966).

[3] The Establishment Clause does not generally forbid religious expression by government. *See, e.g., School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963) (noting that government schools may teach non-devotional courses on the Bible or religion, and that such courses are commendable). But the Establishment Clause does set certain *specific* parameters on such expression, in addition to the prohibition on endorsement discussed above, such as when it coerces compliance with religion, *see Lee* v. *Weisman*, 505 U.S. 577, 587 (1992), amounts to government proselytization, *see Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266, 2278 (2000), or otherwise excessively entangles government in religious affairs. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 613-14 (1971).

increasing diversity of religious faiths in America. What follows are some examples of government expression reflecting the breadth of that diversity.

A. Displays, Monuments, and Memorials

In 1966, Srila Prabhupada began reciting a Hare Krishna prayer under a tree in Tompkins Square Park in New York City, thus introducing his faith into American culture for the first time. On November 18, 2001, the City of New York's Department of Parks and Recreation dedicated a plaque to mark that tree as the "Hare Krishna Tree," and to commemorate the "founding of the Hare Krishna religion in the United States."[4]

The City of Mesa, Arizona dedicated a plaque to the memory of a Sikh murdered soon after September 11, 2001, simply because of his appearance and mistaken religious identity. Among other things, the memorial stated that, "Sikhs believe: In one God. That all religious paths lead to God. That all people are equal in the eyes of God. In peace, and love for humankind."[5] The plaque was dedicated one year after the shooting at the "Embrace Diversity Memorial Event" sponsored by the City.

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[4] *See* Srila Prabhupada's Hare Krishna Tree, *available at* http://www.harekrsna.com/philosophy/acarya/newyork.htm (last visited Dec. 8, 2004).

[5] *See* Balbir Singh Sodhi Memorial Dedication September 14, 2003 in Mesa, Arizona, USA, *available at* http://healingsource.com/sodhi/sept-14-2003/gallery/pages/med/100_med.html (last visited Dec. 8, 2004); Embrace Diversity Event to Offer Poignant Evening in Mesa, *available at* http://www.sikhnet.com/s/EmbraceDiversityNews (last visited on Dec. 8, 2004).

The federal government has made the Pueblo Bonito ruins in Chaco Canyon, New Mexico a national monument, in order to memorialize the main social and religious center of the Native American culture of the Anasazi.[6]

Similarly, in Hawaii, the federal government has extended special historic status two religious monuments, the Pu'ukohola Heiau Temple constructed in honor of the war god Kuka'ilimoku,[7] and the ancient Hawaiian cultural and religious site known as Kaloko-Honokohau.[8]

Sharon, Vermont is home to the Birthplace Memorial for Joseph Smith, Founder of the Church of Jesus Christ of Latter Day Saints.[9]

Government museums such as the National Gallery in Washington, DC routinely display Islamic art,[10] as well as

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[6] Places of Peace and Power: The Sacred Site Pilgrimage of Martin Gray, *available at* http://www.sacredsites.com/americas/united_states/chaco_canyon.html (last visited Dec. 8, 2004).

[7] Puukohola Heiau National Historic Site, *available at* http://www.nps.gov/puhe (last visited Dec. 8, 2004).

[8] Kaloko-Honokohau National Historic Site, *available at* http://www.nps.gov/kaho (last visited Dec. 8, 2004).

[9] *See* Religion in Vermont, *available at* http://www.adherents.com/loc/loc_vermont.html (last modified Sept. 1, 2001).

[10] National Gallery of Art, Current Exhibitions: Palace and Mosque: Islamic Art from the Victoria and Albert Museum, July 18, 2004 - February 6, 2005, *available at* http://www.nga.gov/exhibitions/index.shtm#islamic (last visited Dec. 8, 2004).

Buddhist and Hindu art.[11]

Government monuments and structures routinely depict Roman gods, such as the Roman Goddess of Liberty on the United States Capitol Building.

Government buildings often reflect the religiosity of Americans, while respecting their religious diversity, by using generic references to God. For example, at the top of the Washington Monument in Washington, D.C. are the words, "Laus Deo" or "Praise Be To God." The Tomb of the Unknown Soldier in Arlington, Virginia contains the inscription, "Here Rests in Honored Glory an American Soldier Known but to God."[12]

B. Commemorative Events and Holidays

In recent years, the White House has acknowledged a wide range of faiths by hosting events to commemorate significant religious holidays. For example, the White House:

- Recognizes Hinduism by inviting religious leaders for a celebration of Diwali;[13]
- Recognizes Islam by hosting an Iftar dinner during Ramadan;[14]
- Recognizes Judaism by lighting and displaying a menorah throughout Hanukkah;[15]
- Recognizes Sikhism by celebrating the 400th anniversary of Guru Granth Sahib with Sikh religious leaders and practitioners.[16]

Similarly, state and local governments celebrate cultural and religious diversity by marking and accommodating holidays and hosting festivals.

New Mexico Governor Bill Richardson recently declared October 23, 2004 as Yogi Bhajan Memorial Day in honor of the Sikh leader.[17]

Pearland, Texas recognized July 27, 1982 as Meenakshi Temple Day to commemorate the opening of the Hindu temple after the final consecration rituals were performed.[18]

National Gallery of Art, Past Exhibitions: The Sculpture of Indonesia1, July-4 November 1990, *available at* http://www.nga.gov/past/data/exh622.shtm (last visited Dec. 8, 2004).

[12] The Tomb of the Unknowns, Arlington National Cemetery, *available at* http://www.arlingtoncemetery.net/tombofun.htm (last modified on Apr. 10, 2004).

[13] Express India, *Diwali celebrated in White House*, (posted online Nov. 11, 2004) *available at* http://www.expressindia.com/fullstory.php?newsid= 38356.

[14] The White House, Ramadan 2003, *available at* http://www.whitehouse.gov/infocus/ramadan (last visited on Dec. 8, 2004).

[15] Menorah Lighting from the White House, *available at* http://www.whitehouse.gov/president/holiday/ hanukkah (last visited on December 8, 2004).

[16] The Sikh Network, *400th Anniversary Sikh Celebration at White House a Success* (last visited on Dec. 8, 2004) *available at* http://www.sikhnet.com/s/AdiGranthWhiteHouse.

[17] Sarb Nam Kaur Khalsa, *SikhNet News*, "New Mexico Governor Richardson Declares 'Yogi Bhajan Memorial Day'" (October 23, 2004) *available at* http://www.sikhnet.com/s/YBMemorialDay.

[18] Hinduism Today, *Inaugural Ceremonies Held for Sri Meenakshi Temple in Houston, Texas* (last visited on Dec. 8,

The Jersey City, New Jersey government celebrates the Hindu New Year annually with the Grand Phagwah parade, and celebrates Ramadan to acknowledge the Muslim members of the community.[19]

C. Flags, Seals, and Mottos

The official flags and government seals of states commonly contain religious elements.

State Flags:[20]

- Florida: Features state motto "In God We Trust."
- Georgia: Features state motto "In God We Trust."
- New Jersey: Features Roman Goddesses of Liberty and Agriculture.
- New Mexico: Features sun symbol sacred to the Native American Zia people.
- New York: Features Roman Goddesses of Liberty and Justice.
- South Dakota: Features state motto "Under God the People Rule."
- Virginia: Features Roman Goddess of Virtue.

State Seals:[21]

2004) *available at* http://www.hinduismtoday.com/archives/1982/08/ 1982-08-06.shtml.

[19] Court Oversteps Its Bounds In Jersey City, *available at* (http://www.schundler.org/schundler/court_oversteps_its_bounds_in.html last visited on Dec. 8, 2004).

[20] State Flags of the 50 States, *availabe at* http://www.netstate.com/state_flags.htm. (last visited on Dec. 8, 2004)

- Arkansas: Features Roman Goddess of Liberty.
- Arizona: Features state motto "Ditat Deus" or "God Enriches."
- California: Features Roman Goddess of Wisdom.
- Colorado: Features "Eye of God" and state motto "Nil Sine Numine" or "Nothing without the Deity."
- Florida: Features state motto "In God We Trust."
- Hawaii: Features Roman Goddess of Liberty.
- New Jersey: Features Roman Goddesses of Liberty and Agriculture.
- New York: Features Roman Goddesses of Liberty and Justice.
- North Carolina: Features Roman Goddesses of Liberty and Plenty.
- South Dakota: Features state motto "Under God the People Rule."
- Virginia: Features Roman Goddess of Virtue.

Similarly, the flags, seals, and mottos of local governments often contain religious aspects. The City of Boston, for example, adopted the motto "Sicut Patribus Sit Deus Nobis" or "God Be with Us as He Was with Our Fathers" and prominently displays this message on the city's flag and seal.[22]

D. Coins, Medals, and Stamps

It is well known and often repeated that the national motto, "In God We Trust," appears on American currency.

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[21] State Seals of the 50 States , *available at* http://www.netstate.com/state_seals.htm (last visited on Dec. 8, 2004).

[22] A View On Cities, Boston Pictures, *available at* http://www.aviewoncities.com/img/zzflags/us_massachusetts_boston-l.gif (last visited on Dec. 6, 2004).

But other coinage issued by the United States Mint contains religious elements as well.

For example, the Mint has issued three commemorative medals in honor of Catholic clergy: Pope John Paul II for his "many enduring contributions to peace and religious understanding";[23] John Cardinal O'Connor for his advocacy of interfaith healing particularly among Catholics and Jews;[24] and Father Theodore M. Hesburgh for his "outstanding and enduring contributions to . . . the Catholic Church [and] the Nation . . . ."[25] These coins bear witness to the dynamism of America's religious life and culture and how government expression appropriately responds to reflect that. Though Catholics were once a persecuted minority in this country, their contributions to American culture are now recognized and commemorated by the government.

Commemorative stamps routinely mark a wide variety of religious holidays and traditions. The United States Postal Service currently offers stamps for Kwanzaa, Hanukkah, Christmas, and Eid.[26] Commenting on the Eid

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[23] The United States Mint, The Pope John Paul II Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID= 5 (last visited on Dec. 8, 2004).

[24] The United States Mint, The John Cardinal O'Connor Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID= 10 (last visited on Dec. 8, 2004).

[25] The United States Mint, The Father Theodore M. Hesburgh Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID=2 (last visited on Dec. 8, 2004).

[26] Happy Holidays, usps.com/shops, *available at* http://shop.usps.com/cgi-

stamp, the Postal Service's Vice President of Public Affairs and Communications explained that the purpose of the stamp was to "highlight the business, educational and social contributions of the estimated six to seven million Muslims in this country whose cultural heritage has become an integral part of the fabric of this nation."[27]

E. Declarations and Resolutions

House Resolution 816, proposed in the 2nd Session of the 108th Congress on October 4, 2004, specifically acknowledges "the historical and cultural significance of Diwali"—celebrated by Hindus, Sikhs, and Jains in the United States—and calls on the President to officially recognize the holiday.[28]

Texas Muslims Legislative Day—an event in Austin, Texas hosted by state Representative Jerry Madden—is an effort by the Texas state government to actively include Muslims in the political process.[29]

Even before September 11, 2001, the United States

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bin/vsbv/postal_store_non_ssl/home.jsp(last visited on Dec. 8, 2004).

[27] Philatelic News, *Postage Stamp Celebrating Muslims Holiday to be Re-Issued* (Aug. 12, 2002), *available at* http://www.usps.com/news/2002/philatelic/sr02_052.htm (last visited on Dec. 8, 2004).

[28] Recognizing the Holiday of Diwali, H. Res. 816, 108th Cong. (2004) *available at* //thomas.loc.gov; H. Cong Res. 174, 106th Cong. (1999) (enacted) *available at* http://thomas.loc.gov.

[29] Austin Area Interreligious Ministries, *For 9/11, Crossing the Divide* (Sept. 17, 2004), *available at* http://www.aaimaustin.org/news/9112004.htm (last visited on Dec. 8, 2004).

Senate and House of Representatives proposed similar resolutions that recognized the Muslim community as "a vital part of our Nation, with more than 1,500 mosques, Islamic schools, and Islamic centers in neighborhoods across the United States."[30]

III. THE REASONABLE OBSERVER SHOULD BE DEEMED AWARE OF THE FOREGOING.

American governments inevitably engage in cultural expression; American culture inevitably includes diverse religious aspects; therefore, the cultural expression of American governments inevitably includes diverse religious aspects. And, as the numerous examples above illustrate, concrete experience confirms this abstract logic.

In short, any reasonable observer should be aware of the fact that government cultural expression in the United States commonly contains religious elements that acknowledge the contributions of America's diverse religious people to that culture. And that fact should serve as the context for evaluating whether any particular government expression that includes religious elements—such as the display at issue in this case—passes muster under the Establishment Clause.

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[30] S. Res. 133, 108th Cong. (2003) (enacted) *available at* http://thomas.loc.gov.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

(12)

No. 03-1693

IN THE
Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, *ET AL.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *ET AL.*,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF AMICUS CURIAE OF CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, JOYCE MEYER MINISTRIES, COMMITTEE TO PROTECT THE FAMILY FOUNDATION, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AMERICAN HERITAGE PARTY, PUBLIC ADVOCATE OF THE UNITED STATES, RADIO LIBERTY, AND SPIRITUAL COUNTERFEITS PROJECT, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The *amici curiae*, Conservative Legal Defense and Education Fund, Joyce Meyer Ministries, Committee to Protect the Family Foundation, Lincoln Institute for Research and Education, American Heritage Party, Public Advocate of the United States, Radio Liberty, and Spiritual Counterfeits Project, Inc., are a coalition of nonprofit organizations, and a media organization, sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] Each of the *amici* is tax-exempt under section 501(c)(3), section 501(c)(4), or section 527 of the Internal Revenue Code, except for Radio Liberty, an independent media organization.

Each of the *amici* is involved in informing and educating the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution, and/or supporting organizations or causes with such educational goals. The First and Fourteenth Amendment issues presented in this case have a direct impact the right of organizations to express their views on religious, educational, social, and political issues, and are of great interest to these *amici*. In the past, most of the *amici* have filed *amicus curiae* briefs in other federal litigation, including matters before this Court. These *amici* seek to provide this Court with a perspective that would not otherwise be presented.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to its preparation or submission.

[2] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief, in the form of a letter from counsel of record for petitioners and a notice of "global consent" from counsel for respondents, and these have been submitted to the Clerk of Court for filing. *See* Sup. Ct. R. 37.3(a).

SUMMARY OF ARGUMENT

The central question presented in this case is whether this Court's test laid down in Lemon v. Kurtzman, 403 U.S. 602 (1971), and any variant thereof, applying the Establishment Clause of the First Amendment to the several states should be overruled. For years, the Lemon test has been roundly criticized as unworkable[3], but that is only a secondary reason to reject it. Rather, this Court should overrule Lemon because it rests upon the wholly illegitimate premise that the Establishment Clause applies to the States through incorporation into the Fourteenth Amendment's Due Process Clause.

This Court has not entertained any serious challenge to that doctrine since Duncan v. Louisiana, 391 U.S. 145 (1968), but, if a constitutional doctrine proves to be erroneous, its longevity is no reason to keep it. *See* C. Rice, "The Bill of Rights and the Doctrine of Incorporation," The Bill of Rights 11 (E. Hickok, Jr., ed., Univ. Press of Va.: 1991). Each justice of this Court has a continuing, sworn obligation to ensure that the Court's doctrines are consistent with the text of the Constitution. A line of judicial precedents, no matter how long unbroken, must never "close" the Constitution to reinspection, to ensure conformity to its text. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

Moreover, *stare decisis* is no bar to repudiation of this Court's Establishment separationist doctrine, even though embedded in a line of precedents stretching back for 59 years. Indeed, this Court's decisions, which have transmuted the original historical purpose of the Establishment Clause as a

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[3] *See, e.g.*, Freethought Society v. Chester County, 334 F.3d 247, 256 n.4 (3d Cir. 2003).

shield of protection of the states from the exercise of federal power[4] into a sword of supremacy of federal power over the states — contrary to the powers reserved to the States and the people by the Tenth Amendment — should be stricken as an illegitimate exercise of political will by this Court. *See* W. Lietzau, "Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation," 39 *DePaul L. Rev.* 1191 (1990); Note, "Rethinking the Incorporation of the Establishment Clause: A Federalist View," 105 *Harv. L. Rev.* 1700 (1992).

To correct this error, this Court should return to the original meaning of the Fourteenth Amendment's Due Process and Privileges and Immunities Clauses, as set forth in this Court's opinions in the Slaughter-House Cases, 83 U.S. 36 (1873), and Davidson v. Board of Administrators of the City of New Orleans, 96 U.S. 97 (1878), neither of which has ever been expressly overruled. Both preserve the Constitution's federalist structure, recognizing that the state and local citizenry retain the constitutional authority to make their own decisions concerning matters such as displays of the Law of God.

Finally, to continue to usurp power over the States and their political subdivisions by misapplying the Establishment Clause — as this Court has done since Everson v. Board of Education, 330 U.S. 1 (1947) — while requiring all other branches of the federal and state governments to support this Court's decisions as the supreme law of the land — as this Court has done since Cooper v. Aaron, 358 U.S. 1, 18-19 (1958) — would thrust a dagger into the very heart of the rule of law. *See* R. Berger,

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[4] "The wall of separation between church and state, then, if it existed at all, was not between government and the public, but between the federal government and the states." P. Johnson, A History of the American People, 211 (HarperCollins: 1997).

Government by Judiciary 289 (Harvard Press: 1977). In truth, any elevation of this Court above the Constitution undermines the oaths of all federal judges before God to "support this Constitution" as the "Supreme Law of the Land," as prescribed by 28 U.S.C. Section 453, and as further reflected in this Court's practice to open its public sessions with the prayer, "God save this honorable court." A court which disregards its oath and its prayer risks judgment of the "rectitude of [its] intentions" by the "Supreme Judge of the world" and deprivation of the "Protection of Divine Providence" on the nation, as invoked by America's founders in the Declaration of Independence (para. 31). Sources of Our Liberties at 321.

ARGUMENT

I. "THIS CONSTITUTION ... SHALL BE THE SUPREME LAW OF THE LAND."

A. Judicial Review Requires Textual Fidelity.

Fully 201 years ago, this Court embarked upon a visionary journey to ensure that the newly-established government of the United States would be a "government of laws, and not of men." *See* Marbury v. Madison, 5 U.S. at 163. To that end, the Marbury Court believed that, through the power of judicial review, it could apply the Constitution to the acts of the other branches of government, while remaining itself **under** the law of that instrument. Thus, Chief Justice John Marshall twice pronounced that the **written** Constitution is a "rule for the government of courts," just as it is a rule governing the "other departments" of the federal government (*id.*, 5 U.S. at 179-80), exhibiting prescient understanding that the rule of law "goes out the window" if "words and phrases" of the Constitution mean whatever the judges "may wish." *See* M. S. Evans, The Theme is Freedom 268 (Regnery: 1994).

Under Marbury, the judicial oath of office required the courts to examine the language of the Constitution, to discover the rule of law stated therein, and then to apply that rule to the facts of the case. *See* E. White, "Reflections on the Role of the Supreme Court: the Contemporary Debate and the 'Lessons' of History," 83 *Judicature* 162, 163 (1979). To that end, the Court developed a rule of construction designed to ensure that the Court would not stray from the written text:

> In expounding the Constitution ... **every word** must have its due force, and appropriate meaning; for it is evident ... that **no word** was unnecessarily used, or needlessly added.... **Every word** appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. **No word** ..., therefore, can be rejected as superfluous or unmeaning.... [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840) (emphasis added).]

Under strict textual constraint, the Court sought to realize Chief Justice Marshall's vision that: "Courts are the mere instruments of the law.... Judicial power is **never** exercised for the purpose of giving effect to **the will of the judge; always** for the purpose of giving effect ... to **the will of the law**." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (emphasis added).

B. Judicial Review Requires Fidelity to the Original Meaning of the Text.

Because **all** government officials, including federal judges, derive their just powers from the consent of the governed, the Marbury Court understood that the courts, then and in the future, were obligated to apply the **original** meaning of the

text:

> That the people have an **original right** to establish, for their **future** government, such **principles** as, in **their opinion**, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.... The **principles** ... **so established**, are ... **fundamental**. And **as the authority from which they proceed is supreme**, ... **they are designed to be permanent**. [Marbury, 5 U.S. at 176 (emphasis added).]

Thus, "the province and duty of the judicial department to say what the law is" (*id.*, 5 U.S. at 177) obligates the courts to examine the actual words of the Constitution in deference to the "form and ... substance" of the "government of the Union" as having "emanate[d]" from the people, not from this Court. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819). Because the courts "must never forget[] that it is *a constitution* [they] are expounding," the "objects" and the "limitations" prescribed therein must be applied as the people originally ordained. *Id.*, 17 U.S. at 407 (emphasis original).

This "originalist" restraint upon the power of judicial review applied not only to judicial ascertainment of the powers of the federal government (*see id.*, 17 U.S. at 407-08, 411-25), but also to the limits on the powers of government, both federal and state. Thus, the Marshall Court refused to apply the federal Bill of Rights to limit the powers of the several States, because the original language of the Constitution did not allow it:

> **The constitution was ordained and established** by the people of the United States ... for their own government, and **not for the government of the individual states.** [Thus] the limitations on power, if expressed in general terms, are ... necessarily applicable to the government created by the instrument. [Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (emphasis added).]

C. *Stare Decisis* Requires Conformity to the Meaning of the Original Constitutional Text.

This Court has largely forgotten this fundamental principle of textual restraint and has misused the power of judicial review to replace the federal system of government established by the express words of the Constitution with a unitary system expressly contrary to the Constitutional text. As demonstrated in Part II below, this Court has imposed its own political vision upon the individual States by misappropriating the Fourteenth Amendment's Due Process Clause, and then misapplying the doctrine of *stare decisis* to justify its unconstitutional interpretation of "due process of law."

For example, in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), a plurality of this Court invoked "the rule of *stare decisis*" to retain and reaffirm "the essential holding of Roe v. Wade." *Id.*, 505 U.S. at 846. In order to accomplish this goal, the Court "reformulat[ed] the doctrine of *stare decisis*" as "a prop to preserve the power of the Court," equating its ruling in Roe v. Wade to "the rule of law." *See* C. Stern, "The Common Law and the Religious Foundations of the Rule of Law Before Casey," 38 *U.S.F.L. Rev.* 499, 520-22 (2004). According to Casey, the rule of law depends wholly upon "the people's acceptance of the Judiciary as fit to **determine** what the Nation's law **means** and to **declare** what it **demands**." *Id.*, 505 U.S. 865 (emphasis added).

It is not this Court's job, however, "to determine" the meaning of the "Nation's law," as if it were a body of Platonic guardians of the people. As enunciated in Marbury, **only** the people have the authority to determine the law, and they have previously made that determination by producing a **written** Constitution which is, itself, "the Supreme Law of the Land," binding on this Court. *See* Marbury, 5 U.S. at 179-180. To read Marbury otherwise — as this Court has done in Cooper v. Aaron, 358 U.S. 1 (1958) — is to elevate judicial interpretation of the Fourteenth Amendment, even if "misguided," to be "the supreme law of the land," over the actual written Constitution. *See* E. Meese, "Perspective on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution," 61 *Tul. L. Rev.* 979, 982-83 (1987). To invoke *stare decisis* to insulate this Court's prior interpretations of the Constitution — right or wrong — from examination in light of the constitutional text undermines the rule of law, threatening a regime of judicial despotism whereby the validity of the Court's constitutional interpretations is measured by its own opinions.

Just short of two decades ago, this Court rebuked United States District Court Judge Brevard Hand for daring to reexamine — in the light of the constitutional text and history — this Court's Establishment Clause jurisprudence as applied to the State of Alabama. Wallace v. Jaffree, 472 U.S. 38, 48 (1985). Remarkably, this Court dismissed Judge Hand's careful analysis of the original text and of the testimony of constitutional historians, James McClellan and Robert Cord,[5] with a perfunctory parade of its own precedents. *See id.*, 472 U.S. at 48-55.

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[5] *See* Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala. 1983).

At the time of America's founding, the prevailing legal authorities believed that a court was duty-bound to measure the correctness of a judicial decision by a standard outside of its own precedents. *See* W. Blackstone, I *Commentaries on the Laws of England* 69-71 (U. Chi. Facsimile edition: 1765). While "the decisions ... of courts [were] held in the highest regard," Blackstone warned that they were not "law" themselves, but only "evidence" of law, "[s]o that *the law,* and *the opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." *Id.* at 69-70, 71 (emphasis original). New York's Chancellor James Kent agreed, asserting that "[e]ven a series of decisions are [*sic*] not always conclusive evidence of what is law," and where such decisions are shown to be "**hasty** and **crude**," they "ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by **the perpetuity of error.**" J. Kent, I *Commentaries on American Law* 444 (O. Halsted, New York: 1826) (emphasis added).

According to these venerable authorities — and further in light of the utter failure of the Lemon test to provide a comprehensible rule of law[6] — this Court must not shrink from its task to reexamine, in light of the constitutional text, its incorporationist decisions applying the Establishment Clause to the States. As Justice Felix Frankfurter once observed, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *See* Graves v. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., dissenting). *See generally* R. Berger, Government by Judiciary at 296-99.

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[6] *See* Freethought Society v. Chester County, 334 F.3d at 256 n.4.

II. THE ESTABLISHMENT CLAUSE DOES NOT APPLY TO THE STATES.

By its express language, the First Amendment's Establishment Clause applies only to Congress. Yet, this Court has applied that Clause to local school boards, cities, counties, state legislatures, and executive officials. *See, e.g.,* Everson v. Board of Education, 330 U.S. 1, 15-16 (1947); Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Marsh v. Chambers, 463 U.S. 783 (1983); Edwards v. Aguillard, 482 U.S. 578 (1987). The Court has justified this extension on the ground that the Due Process Clause of the Fourteenth Amendment incorporates all the rights in the First Amendment, as well as all but one of the rights specified in the Fourth, Fifth, Sixth, and Eighth Amendments. *See* Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968); Robinson v. California, 370 U.S. 660 (1962); Benton v. Maryland, 395 U.S. 784 (1969); and Schlib v. Kuebel, 404 U.S. 357 (1971). Through its incorporation doctrine, this Court has justified imposing its much-maligned, albeit modified, three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971), to resolve Establishment Clause complaints against the States. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 316 (2000). If this Court's incorporation doctrine is erroneous, then so are both the original and modified Lemon tests.

A. The Fourteenth Amendment's Due Process Clause Does Not Incorporate Any of the Bill of Rights.

As noted above, this Court unanimously declared in 1833 that, of the ten articles of the federal Bill of Rights, only the Tenth applied to the States. *See* Barron v. Baltimore, 32 U.S. at 243, 247, 248-49. With the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments came new constitutional provisions addressed expressly to the several

States. After careful examination of the language of the three amendments in their historical context, however, this Court found that none had changed the fundamental federal structure of the United States Constitution. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 66-82 (1873). Emphasizing that the Fourteenth Amendment had reaffirmed America's unique dual citizenship (*id.* at 72)[7], the Court ruled that the protection afforded by the Fourteenth Amendment from state abridgments of "the privileges and immunities of citizens of the United States" did **not** include those privileges and immunities arising out of one's state citizenship. Rather, except for the protection afforded out-of-state citizens by Article IV, Section 2 of the Constitution, those privileges and immunities arising out of an American citizen's state citizenship were secured to a state's own citizens by the constitutions of the several States, **not** by the newly-enacted Privileges and Immunities Clause of the Fourteenth Amendment. *Id.*, 83 U.S. at 73-81.

Notwithstanding the Slaughter-House ruling, litigants continued to press federal constitutional claims against the States and their political subdivisions, invoking the Fourteenth Amendment's Due Process Clause. In 1878, in response to an overcrowded docket of such cases, the Court observed "that there exists some **strange misconception of the scope of this provision as found in the XIVth Amendment**." Davidson v. New Orleans, 96 U.S. 97, 104 (1878) (emphasis added). Thus, the Davidson Court dismissed a Fourteenth Amendment Due Process claim against New Orleans, ruling that the insertion of that clause into the Constitution had not changed the holding in Barron v. Baltimore that the "takings clause" of the Fifth Amendment did not apply to the States. *Id.*, 96 U.S. at 104-05.

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[7] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

In support of its holding, the Court explained that the phrase, "due process of law," had not acquired a new meaning when it was placed in the Fourteenth Amendment:

> The prohibition against depriving the citizen or subject of his life, liberty, or property, without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866.
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> The equivalent of the phrase "due process of law"... is found in the words "law of the land," in the Great Charter.... In the series of amendments to the Constitution of the United States ... as further limitations upon the power of the Federal Government, it is found in the fifth, in connection with **other guaranties** of personal rights of the same character. [*Id.*, 96 U.S. at 101 (emphasis added).]

Without reciting the rule of constitutional construction in Holmes v. Jennison, the Davidson Court nevertheless applied it, refusing to construe the two Due Process Clauses differently, lest it render the other express guarantees in the federal Bill of Rights "superfluous or unmeaning." *See* Holmes, 39 U.S. at 571.

Nine years later, however, the Court inexplicably departed from this rule of construction, attributing to the Fourteenth Amendment's Due Process Clause the same protection that was secured by the Fifth Amendment's Takings Clause. *See* Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236 (1897). The Court did not explain how the

Fourteenth Amendment's Due Process Clause could possibly contain a just compensation requirement limiting a city's taking for public use, when the previously-ratified Fifth Amendment's Due Process Clause appeared alongside a separate and independent Takings Clause in the very same amendment. Instead, it simply jettisoned its rule of constitutional construction that "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *See* Holmes v. Jennison, 39 U.S. at 570-571. Moreover, the Court departed from the original meaning of "due process of law" which did not embrace the just compensation rule of the Takings Clause. *See* T. Cooley, A Treatise on Constitutional Limitations 430-511, 653-54 (5th ed. Little, Brown: 1883).

After the Chicago B. & Q. Railroad case, the Court appeared to halt efforts to further expand the protection of the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Brown v. New Jersey, 175 U.S. 172 (1899). Indeed, 11 years after the Chicago case, the Court apparently believed that it had never departed from its position that the term "due process" in the two Due Process Clauses meant the same thing. Twining v. New Jersey, 211 U.S. 78, 101 (1908). Thus, in Twining, the Court refused to find the Fifth Amendment's privilege against self-incrimination in the Fourteenth Amendment's Due Process Clause (*id.*, 211 U.S. at 99-114). Further, in 1922, the Court concluded that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about the 'freedom of speech' ...." Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

Nevertheless, just three years after Prudential, the Court ruled that "we **may and do assume** that **freedom of speech and of the press** — which are protected by the First

Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' **protected by the due process clause of the Fourteenth Amendment from impairment by the states**," perfunctorily dismissing its statement to the contrary in Prudential as completely "incidental." Gitlow v. New York, 268 U.S. 652, 666 (1925) (emphasis added). Like the Chicago B. & Q. Railroad Court, the Gitlow Court utterly disregarded the fact that its reading of the Fourteenth Amendment's Due Process Clause was unprecedented. Never before had the phrase "due process of law" been understood to include the freedoms of speech and of the press. *See* T. Cooley, A Treatise on Constitutional Limitations at 430-541 and 512-575. Moreover, if the Gitlow Court's construction of the Fourteenth Amendment's Due Process Clause were applied to the same clause in the Fifth Amendment, it would render the First Amendment's explicit protection of the freedoms of speech and of the press "superfluous and unmeaning," in violation of the rule of construction in Holmes v. Jennison. But neither textual restraint hindered the Court after Gitlow from routinely imposing the First Amendment's speech, press, and assembly restrictions upon the States. *See, e.g.,* Near v. Minnesota, 283 U.S. 697 (1931) and DeJonge v. Oregon, 299 U.S. 353 (1937).

In none of these cases did the Court attempt a textual analysis to show how these First Amendment rights came to be incorporated into the Fourteenth Amendment's Due Process Clause. Instead, the Court simply stated its incorporationist doctrine as a judicial *fait accompli*: That such First Amendment "immunities ... **have been found to be implicit in the concept of ordered liberty**, and thus, through the Fourteenth Amendment, become valid as against the states." Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (emphasis added). The Court made no effort to reconcile its view that the Fourteenth Amendment's Due Process Clause embraced a

substantive "concept of ordered liberty," whereas it had previously ruled that the Fifth Amendment's Due Process Clause contained only the **procedural** principle embodied in the "law of the land" phrase found in the Magna Charta. *See* Murray v. Hoboken Land Improvement Co., 59 U.S. (18 How.) 272 (1856). Nor did the Court explain then — nor has it ever explained — how the Fourteenth Amendment's Due Process Clause **evolved** in such a way as to have embraced the freedoms of speech, assembly and the press, when **all** of these guarantees were the product of legal and political developments **after** the 1215 Magna Charta, and were recognized separately and independently from the "law of the land" clauses in several of the original thirteen state constitutions. *See, e.g.,* Articles IX, XII, and XVI, *Constitution of Pennsylvania* (Aug. 16, 1776), reprinted in Sources of Our Liberties 330-31 (Perry, ed., ABA Found: 1972). *See generally* Sources of Our Liberties 5-6, 233-35, 242-44, 312, 339-40, 348-350, 355-56, 366, 376-77, 384-85, and 422-46.

In a case in which a criminal defendant in a state trial was seeking the benefit of the federally-guaranteed privilege against self-incrimination, however, the Court finally addressed the impact of its revolutionary interpretation of "due process of law" on the federal Bill of Rights. In a biting concurring opinion, Justice Frankfurter ridiculed the argument that "'due process of law' [was] merely a shorthand statement of other specific clauses" that appeared in the Fifth Amendment alongside its Due Process Clause. Such a claim, he argued, would attribute to the "authors and proponents" of the federal Bill of Rights either (a) "ignorance of, or indifference to," the historic meaning of "due process of law," or (b) foolishness in placing the privilege against self-incrimination as a "meaningless clause" in the Bill of Rights. Adamson v. California, 332 U.S. 46, 66 (1947).

Justice Black countered that his study of the "**historical events** that culminated in the Fourteenth Amendment, and the **expressions** of those who sponsored and favored ... its submission and passage" had persuaded him that "one of the chief objects [of] the provisions of the Amendment's first section, separately, and as a whole ... was to make the Bill of Rights[] applicable to the states." *Id.*, 332 U.S. at 71-72 (emphasis added). Significantly, however, Justice Black made no attempt to demonstrate how the **language** of the first section of the Fourteenth Amendment embraced the **expressions** the Fourteenth Amendment's supporters and opponents made during a congressional debate. Instead, Justice Black amorphously argued: "**In my judgment that history** conclusively demonstrates that the language ..., taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." *See id.*, 332 U.S. at 74-75 (emphasis added).[8]

Twenty-one years after Adamson, Justice Black's nontextual approach to the Fourteenth Amendment prevailed. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court simply stated that the "spacious language" of the Fourteenth Amendment's Due Process Clause had led the Court to "look increasingly to the Bill of Rights for guidance," and hence, "many of the rights guaranteed by the first eight Amendments to the Constitution have been **held** to be protected against state action." *Id.*, 391 U.S. 147-48 (emphasis added). To be sure, the Court recited three of the "tests" that it had applied in this selective

[8] In his monumental study of the historical record, Professor Charles Fairman found "Justice Black's position fatally weak." "Does the Fourteenth Amendment Incorporate the Bill of Rights?," 2 *Stan. L. Rev.* 5, 171 (1949).

incorporationist venture, but all three were self-devised and totally disconnected from any meaning of "due process of law" ever contemplated by the People who ratified the original Constitution. In short, having discarded the Holmes v. Jennison rule of constitutional construction that no word in the Constitution was "superfluous or unmeaning,"[9] the Duncan Court simply announced a judicial *coup d'etat*, utilizing "due process of law" not as a legal term **of meaning fixed in time**, but a kind of judicial chameleon, changing in meaning with the changing political preferences of a majority of the justices sitting on this Court.[10] *See generally* G. Carey, In Defense of the Constitution 141-42 (Liberty Fund: 1995).

By adopting and applying an ever-changing definition of "due process of law," this Court's incorporationist approach to the Fourteenth Amendment's Due Process Clause has enabled a shifting majority of five justices of this Court to impose its political will upon the States in direct contradiction of the fundamental principle undergirding the rule of law that the Marshall Court described in Marbury v. Madison: Only "the people have an original right to establish, for their **future** government, such [permanent] principles as, **in their opinion**, shall most conduce to their own happiness." *Id.*, 5 U.S. at 176 (emphasis added). Additionally, this incorporationist approach has trumped the amendment process prescribed in Article V of the Constitution, heedless of the warning of President George Washington in his 1799 Farewell Address:

> If in the opinion of the People, the distribution

[9] The Court did so, even though it had acknowledged as late as 1946 that it was governed by this rule of construction. *See* Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 77-78 (1946).

[10] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 588 (2003).

> or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But **let there be no change by usurpation**; for though this, in one instance, may be the instrument of good, it is the **customary weapon by which free governments are destroyed**. [G. Washington, *Farewell Address*, excerpted in R. Berger, Government by Judiciary at 299 (emphasis added).]

In sum, incorporationism has evolved into a pernicious doctrine that "subvert[s] the very foundation of all written constitutions," enabling this court in ordinary litigation to by-pass at its "pleasure" the written limits laid down in the document. *See* Marbury, 5 U.S. at 178. *See generally* R. Berger, Government by Judiciary (Harvard Press: 1977). Nowhere has this judicial usurpation of the rule of constitutional law been more clearly revealed than in this Court's decisions applying the First Amendment's Establishment Clause to state and local governments.

B. The Fourteenth Amendment's Due Process Clause Does Not Incorporate the Establishment Clause.

In an "unreflective" opinion, and "without offering reasons and justification"[11], this Court first applied the Establishment Clause to the States in 1947, in Everson v. Board of Education, 330 U.S. 1 (1947). Acknowledging that historically the relationship between religion and the States had not been

[11] M. Glendon and R. Yanes, "Structural Free Exercise," 90 *Mich. L. Rev.* 477, 481, 482 (1991)

governed by a uniform constitutional principle, Justice Black asserted that, as the Court had applied the "free exercise" guarantee of the First Amendment and "the broad meaning given" to it to the States, the same was true of the Establishment Clause. *Id.*, 330 U.S. at 13-15. Placing primary reliance upon Cantwell v. Connecticut, 310 U.S. 296 (1940), all nine justices on the Everson Court agreed. *See* Everson, 330 U.S. at 15, n.22; 22; and 29, n.2. But, relying solely on Schneider v. Irvington, 308 U.S. 147 (1939), the Cantwell Court had concluded that the First Amendment religion clauses had been incorporated by the Fourteenth Amendment's Due Process Clause solely because the other First Amendment freedoms had been found by the Court to be "fundamental," "reflect[ing] the belief of the framers of the Constitution" that the two religious freedom rights in the First Amendment, like the freedoms of speech and press, "lie[] at the foundation of free government by free men." *See* Schneider, 308 U.S. at 161.

Given Justice Black's view that the Fourteenth Amendment, taken as a whole, had incorporated every guarantee of the first eight amendments and applied them to the States, the citation to Schneider to him. It also would have satisfied three of his colleagues — Justices Douglas, Rutledge, and Murphy — all of whom would go on record, within one year, as having subscribed to the total incorporationist view.[12] But, within that same year, all of the other five Everson justices rejected Black's view. In Adamson v. California, 332 U.S. 46 (1947), Chief Justice Vinson and Associate Justices Frankfurter, Jackson, and Burton joined Justice Reed's opinion ruling that the Fourteenth Amendment's Due Process Clause did not incorporate the Fifth Amendment privilege against self-incrimination. Indeed, in his concurring opinion in Adamson,

[12] *See, e.g.*, Adamson v. California, 322 U.S. at 59-92 (Justices Black and Douglas), and at 123-24 (Justices Murphy and Rutledge).

Justice Frankfurter dismissed the claim that the Fourteenth Amendment's Due Process Clause "comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government," in part, on the ground that "[i]t would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way." *Id.*, 332 U.S. at 66, 63 (ante). Thus, Justice Frankfurter rejected not only the total incorporationist views of Justice Black, but even a "selective incorporation of the first eight Amendments" on the further ground that the only "basis of [such a] selection is merely that those provisions of the first eight Amendments are incorporated **which commend themselves to individual justices as indispensable to the dignity and happiness of a free man,**" which is a "merely **subjective test.**" *Id.*, 332 U.S. at 65 (emphasis added).

Yet Justice Frankfurter had voiced none of these concerns in Everson. Instead, he had joined Justice Jackson's and Justice Rutledge's opinions that applied Justice Black's strict separationist view of the Establishment Clause to the States. *Compare* Everson, 330 U.S. 15-16 *with* 330 U.S. 22 and 29. Thus, in the very first case in which this Court applied the Establishment Clause to the States, **not one justice** questioned whether the Establishment Clause should be applied to the States. Indeed, **not one justice** made any effort to demonstrate that the no establishment guarantee met the Court's test that freedom from the establishment of religion, like the freedoms of speech and the press, "reflects the belief of the framers of the Constitution that [it] lies at the foundation of free government by free men." Schneider, 308 U.S. at 161. Nor could anyone have sustained such a claim, in view of the history of state religious establishments, and other religious preferences, which existed side-by-side with the free speech and free press provisions in the state constitutions existing at the time of the adoption of the federal Bill of Rights. *See, e.g.*, Articles II and

XII, *Constitution of Pennsylvania* (Aug. 16, 1776), reprinted in Sources of Our Liberties at 329 and Articles VIII, XXXIII, and XXXVIII, *Constitution of Maryland* (Nov. 3, 1776), reprinted in Sources of Our Liberties at 349-50. *See generally* Sources of Our Liberties at 309-310, 338-40, 353-56, 365-66, and 374-377; M. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 *Wm. and Mary L. Rev.* 2105 (2003).

To accomplish its revolutionary goal of imposing a uniform national rule separating church and state, the Everson Court misappropriated its own precedents, citing two cases — Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) and Watson v. Jones, 80 U.S. 679 (1872) — which did not even mention the First Amendment and two others — Reynolds v. United States, 98 U.S. 145 (1879) and Davis v. Beason, 133 U.S. 333 (1890) — which gave no indication of the scope and extent of the Establishment Clause. *See* Everson, 330 U.S. at 14-15 n.21. Although the fifth case, Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908), did refer to the Establishment Clause, it gave no support to the Everson Court's claim that the Court previously had given the Establishment Clause a "broad interpretation," calling for a wall of separation of church and state. *See id.*, 330 at 14-15, 43 n.35. Instead, Quick Bear supported the moderate view of Justice Story, as subsequently articulated by then-Associate Justice Rehnquist in his concurring opinion in Wallace v. Jaffree, 472 U.S. 38 (1985), that the Establishment Clause "was ... designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others." *Id.*, 472 U.S. at 113.

Because the Everson Court's misappropriations of its prior precedents are so obvious, and because their misapplication went unchallenged, one can only conclude that all nine justices simply ignored Justice Frankfurter's warning, issued just three

years previously in the West Virginia flag salute case, to exercise "judicial self-restraint ... lest we unwarrantably enter social and political domains wholly outside our concern." West Virginia v. Barnette, 319 U.S. 624, 666 (1943) (Frankfurter, J., dissenting). Yet, in Everson, even Justice Frankfurter did not heed his own words. Only recently has careful scholarship uncovered the apparent hidden political agendas that motivated the two leading Everson justices — Justices Black and Frankfurter — to manufacture a strict separationist view of the Establishment Clause and impose it upon the States. In his book, Separation of Church and State, University of Chicago law professor Philip Hamburger has documented that Justice Black, a former Klansman, brought to the Everson case an "anti-Catholic" prejudice that was the moving force behind the effort to defund New Jersey's school busing program, which benefited Catholic parochial schools, the subject matter of the Everson case. *See* P. Hamburger, Separation, at 422-34, 454-63. Whatever other differences Justice Frankfurter may have had with Justice Black, they reportedly melted away in the heat of Justice Frankfurter's "distinct distaste for Catholicism."[13] *Id.* at 474. Indeed, Justice Frankfurter's "'insistent' attitude about a secular separation" of church and state was so strong that it reportedly led him to adopt Justice Black's approach to the Fourteenth Amendment in religion cases, notwithstanding his almost concurrent warning in Adamson that (a) the total incorporationist view was contradicted by the constitutional text, and (b) the selective incorporationist view wrongfully opened the door to "subjective selection" of those guarantees that might "have primacy for one [justice]" while another guarantee "might appear to another [justice] as an ultimate need

[13] Such anti-Catholic character did not end with Everson, but reportedly seeped into the Court which fashioned the Lemon test in 1971. *See* W. B. Ball, Mere Creatures of the State? Education, Religion and the Courts 31-32, 35-39 (Crisis Books: 1994).

in a free society." *See* Adamson, 332 U.S. at 65.

As Justice Thomas has recently pointed out, both the particular history of the Establishment Clause and the text of the Fourteenth Amendment's Due Process Clause cry out for careful, principled analysis, not a subjective test. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 680, 697 (2002). For too long this Court has unreservedly followed Everson and its progeny on the assumption that its Establishment Clause and Due Process premises had been carefully assessed and objectively adopted. But, as shown above, there are strong reasons to believe that the Everson Court rushed headlong into the no-establishment arena, seeking to achieve a strict-separationist political objective.

C. No Fourteenth Amendment Privilege or Immunity Has Been Abridged in this Case.

At the heart of the Lemon test is the claim that violations of the Establishment Clause by state and local governments injure plaintiffs' "standing in the political community." *See* County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (majority opinion) and 625 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984); Wallace v. Jaffree, 472 U.S. at 69 (O'Connor, J., concurring). Thus, if the action at issue has been taken by the State, then the Lemon endorsement test is tailored to assess the impact on a statewide "political community." *See, e.g.,* Capitol Sq. Review Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). If the action is taken by a city or county, then the impact is evaluated accordingly. *See, e.g.,* County of Allegheny, 492 U.S. at 587, 599-600, 620.

The Lemon test, then, is designed to redress a political grievance, **not** a Due Process life, liberty, or property right.

Accordingly, in order to establish "standing" in Establishment Clause cases, plaintiffs must show that the action complained of interferes with their full political participation as citizens of the government entity engaged in the allegedly unconstitutional activity. *See, e.g.*, Books v. City of Elkhart, 235 F.3d 292, 297, 300-01 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); Suhre v. Haywood County, 131 F.3d 1083, 1090 (4th Cir. 1997); Doe v. County of Montgomery, Ill., 41 F.3d 1156, 1158, 1159 (7th Cir. 1994); Saladin v. City of Milledgeville, Ga., 812 F.2d 687, 692-93 (11th Cir. 1987); Freethought Society v. Chester County, 191 F. Supp. 2d 589, 593-94 (E.D. Pa. 2002); Arizona Civil Liberties Union v. Dunham, 112 F. Supp. 2d 927, 929, 932-933 (D. Az. 2000). As the U.S. Court of Appeals for the Seventh Circuit observed in Books v. Elkhart:

> The Supreme Court has cautioned that government "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.'" [235 F.3d at 306-07].

As in Elkhart, the district court below found that the plaintiffs had standing because "they must enter the courthouse to conduct civic business." *See* ACLU of Ky. v. McCreary County, Ky., 96 F. Supp. 2d 679, 682-83 (E.D. Ky. 2000); ACLU of Ky. v. Pulaski County, Ky., 96 F. Supp. 2d 691 (E.D. Ky. 2000). Further, the court of appeals below found, in its application of the Lemon test, that:

> The citizenry exhibits a similar impressionability [of endorsement] in the setting of a county courthouse, where the government carries out one of its quintessential functions — the enforcement of the civil and criminal laws. Typically, citizens are at the courthouse out of necessity — whether they are on trial for a crime, have been subpoenaed as witnesses, are seeking to vindicate their civil rights, have been called to jury duty or are simply contesting parking tickets, registering to vote, or renewing their driver's licenses. [ACLU of Ky. v. McCreary County, Ky., 354 F. 3d 438, 461 (6th Cir. 2003).]

By design and in effect, then, this Court's Lemon test — which the lower courts rightfully understood was designed to vindicate the plaintiffs' claims that the display of the Ten Commandments at issue adversely impacts on their "standing in the political communit[ies]" of three Kentucky counties (*id.*, 354 F.3d at 445) — impermissibly collapses the constitutionally guaranteed dual citizenship into one unitary national citizenship, the privileges and immunities of which are defined by this Court's interpretation of the Establishment Clause. Such a homogenization of citizenship rights was never authorized, nor even contemplated, by the Fourteenth Amendment.

From the beginning, the people of the United States have enjoyed dual citizenship. As citizens of "Free and Independent States,"[14] the people of the original thirteen colonies — acting before the people of the United States formed a government for the nation — formed their respective state governments by ratification of distinct and different state constitutions. Subsequently, as citizens of the United States, the people

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[14] *See* THE DECLARATION OF INDEPENDENCE, para. 24 (1776).

ratified the United States Constitution, creating a new government for the nation, while preserving the independence and sovereignty of the several states. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 801 (1995). Thus, the original Constitution recognized in the people both a citizenship of the United States and a citizenship of an individual State. *Compare* Article I, Section 2, Paragraph 2; Article I, Section 3, Paragraph 3; and Article II, Section 1, Paragraph 5 *with* Article IV, Section 2, Paragraph 1. *See also* U.S. Term Limits, 514 U.S. at 840 (Kennedy, J., concurring).

One of the purposes of the Fourteenth Amendment was to harmonize these two citizenships. By its first sentence, the Amendment proclaimed that a person's national citizenship was acquired either by birth or naturalization, and one's state citizenship was acquired by residence. *See* Slaughter-House Cases, 83 U.S. at 74. Having initially established United States citizenship independent from State citizenship, the Fourteenth Amendment's very next provision was designed to protect that national citizenship from any state law which would "abridge the privileges and immunities" arising out of that citizenship status. In limiting the scope of its protection to such privileges and immunities, the Fourteenth Amendment preserved the preexisting structure of the Constitution, leaving the States as the exclusive protectors of those privileges and immunities that arise out of state citizenship status. As Justice Kennedy has put it most recently, American "citizens ... have two political capacities, one state and one federal, **each protected from incursion by the other**." U.S. Term Limits, 514 U.S. at 921 (emphasis added). Thus, as Justice Kennedy has also observed, this Court, since it decided the Slaughter-House Cases in 1873, has limited the reach of the Fourteenth Amendment's protection of the Privileges and Immunities Clause to only those rights enjoyed by the American people **in their relation to the national government**, not to those rights enjoyed by

them as citizens of the states, counties and cities **in relation to of the communities wherein they reside**. *See* U.S. Term Limits, 514 U.S. at 842-44. Indeed, as the Slaughter-House Court stated, any other construction of the Fourteenth Amendment's Privileges and Immunities Clause would destroy the dual citizenship of the American political system, because it would subject the "entire domain" of privileges and immunities of citizenship to national enforcement and control. *See* Slaughter-House, 83 U.S. at 77-78. *See also* R. Berger, Government by Judiciary at 20-68, 193-220, 249-82.

This distinction between the privileges and immunities of two American citizenships, so carefully drawn by the Fourteenth Amendment, and affirmed by this Court in Slaughter-House, has never been overruled. Instead, it has been "eclipsed"[15] by this Court's unconstitutional incorporationist approach to the Due Process Clause. And nowhere has this "eclipse" been more pronounced than in this Court's misuse of the Establishment Clause to homogenize those two citizenships, thereby depriving the nation of diverse state accommodations of religion which are so vital in the cultivation of civic virtue. Note, "Rethinking Incorporation of the Establishment Clause: A Federalist View," 105 *Harv. L. Rev.* at 1714-17.

III. BY OATH BEFORE GOD, THIS COURT IS OBLIGED TO CONFORM ITS WILL TO THE CONSTITUTIONAL TEXT.

The principal question before this Court is whether it will honor its oath before God to decide this case according to the written law of the Constitution, as promised in Marbury v.

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[15] *See* I L. Tribe, American Constitutional Law 1315-18 (3d ed. 2000).

Madison, or ignore that duty by grounding its decision on its own Establishment Clause "jurisprudence," as it did in Wallace v. Jaffree. *See id.* at 48.

By law, each justice of this Court is required to take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and ... faithfully and impartially discharge and perform all the duties incumbent upon me ... under the Constitution and laws of the United States. **So help me God.**" 28 U.S.C. section 453 (emphasis added). This judicial oath of impartiality with regard to persons and faithfulness concerning the rule of law originated in the Bible. *See Leviticus* 19:15 ("You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.") and *Deuteronomy* 1:16-17. It, therefore, carries with it the rewards of obedience (*Deuteronomy* 16:20; *Psalms* 106:3) and the punishments of disobedience (*see* 2 *Chronicles* 19:8-10). Indeed, from the beginning, America's founders understood the civil oath of office to have "impose[d] a sacred obligation," the "practical force and value [being] derived from faith in God and the sanctions of Divine law." D. Dreisbach, "In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution," 48 *Baylor L. Rev.* 927, 979-80 (1996). The judicial oath of office, then, is not recited as a mere formality, but as a solemn acknowledgment that the authority of the judicial office comes from God, to whom all judges are ultimately accountable for their stewardship of that office. *See Romans* 13:1-4.

Furthermore, this Court opens each of its sessions with the prayer, "God save this honorable court." This, too, is not a mere formal ceremony, but an appropriate recognition of this Court's trust to God's merciful protection. *See, e.g.*, 1 *Samuel*

10:24-25; *Isaiah* 33:22.

This prayer to God, and the oath before Him, are especially important for Article III judges, including members of this Court, because, once appointed, they are not periodically accountable to the people, or even to the President who appointed them, or to the Senate that confirmed them. Rather, they enjoy the perquisites of office so long as they measure up to the standard of "good behavior." Article III, Section 1, United States Constitution. Surely, good behavior obligates each justice to submit to "this Constitution [as] the Supreme Law of the Land," and not to demand that others submit to this Court's opinions as if they were the law of the land. *Cf.* R. Berger, Impeachment 160-65 (Harvard Press: 1973). In recent years, however, this Court has insisted that the lower federal courts follow its precedents "no matter how misguided the judges of those courts may think it to be." *See* Hutto v. Davis, 454 U.S. 370, 375 (1982). Indeed, when United States District Court Judge Brevard Hand honored his oath, refusing to subscribe to what he considered to be an erroneous opinion that the Due Process Clause of the Fourteenth Amendment incorporated the First Amendment's Establishment Clause, this Court considered it "unnecessary" to justify its decisions, but only "to recall" its previous opinions. *See* Wallace v. Jaffree, 472 U.S. at 48-55. Such treatment of lower federal court judges would transform their oath before God, to be faithful to "this Constitution," into an oath of abject fealty to this Court. *See* R. Berger, Government by Judiciary at 288-299.

While it may appear uncommonly difficult for this Court to relinquish the power that it has exercised over the several States and their peoples, by its incorporationist doctrine it could do the nation, and itself, no greater service than candidly to abandon the power that it has incrementally usurped over the States and to return to the "'narrow ... function which the

constitution[] ha[s] conferred on'" it, lest it continue "'to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.'" *See* West Virginia v. Barnette, 319 U.S. at 669 (Frankfurter, J., dissenting). *See also* P. Carrington, "Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court," 50 *Ala. L. Rev.* 397, 399, 400-01, 404, 413 (1999).

CONCLUSION

For the reasons stated, the Lemon test should be overruled, and this case reversed and remanded with instructions to dismiss for lack of jurisdiction, thereby restoring the people of Kentucky to their constitutionally guaranteed choice of state citizenship, unfettered by this Court's previously asserted uniformitarian views of the relation between religion and state and local governments.

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December 8, 2004

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No. 03-1693

Supreme Court, U.S.
FILED
JAN 12 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COUNCIL FOR SECULAR HUMANISM AND INTERNATIONAL ACADEMY OF HUMANISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

- Whether the Establishment Clause prohibits the government from prominently displaying religious texts such as the Ten Commandments in courthouses.

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IN THE

Supreme Court of the United States

No. 03-1693

MCCREARY COUNTY, KENTUCKY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF COUNCIL FOR SECULAR HUMANISM AND INTERNATIONAL ACADEMY OF HUMANISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

The Council for Secular Humanism is a non-profit educational organization headquartered in Amherst, New York. The Council engages in a variety of activities that are designed to support institutions, principles, and values that are consistent with a secular worldview, including democracy, respect for human rights, reliance on reason instead of

[1] The Council and the Academy file this brief with the consent of the parties, and letters evidencing such consent have been filed with the Court. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than the amici has made a monetary contribution to this brief's preparation or submission.

the supernatural, and freedom of inquiry. Among other activities, the Council publishes the journal *Free Inquiry*. The Council has participated as an amicus in other cases involving civil liberties, including *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004) and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The International Academy of Humanism is an affiliate of the Council established to draw on the resources of various distinguished writers, academics, politicians and scientists (including Nobel laureates) in disseminating humanistic ideals and beliefs. Members of the Academy are committed to free inquiry in all fields of human endeavor, the use of the scientific method, and support of humanist values and principles, including freedom of speech and religion and the dignity of the individual. The Secretariat of the International Academy of Humanism consists of Vern Bullough, professor of history, California State University; Antony Flew, professor emeritus of philosophy, Reading University; Paul Kurtz, professor emeritus of philosophy, SUNY at Buffalo; Gerald Larue, professor emeritus of archaeology and biblical studies, University of Southern California at Los Angeles; and Jean-Claude Pecker, professor of astrophysics, College de France, Academie des Sciences. A complete listing of the members of the Academy may be found at www.secularhumanism.org/academy. The Academy previously participated as an amicus in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

SUMMARY OF ARGUMENT

Petitioners' courthouse displays of the Ten Commandments use undeniably religious texts to advance an unmistakable religious goal, namely to convince all those entering the courthouses that the laws applied therein are and should be based on the religious doctrine of a particular faith. It would be difficult to imagine a more vivid example of an Establishment Clause violation.

Not unexpectedly, petitioners attempt to mask their religious intent by contriving a secular purpose for the displays. But "no . . . recitation of a supposed secular purpose can blind one" to the inherently religious nature of the displays. *Stone v. Graham*, 449 U.S. 39, 41 (1980). Moreover, petitioners' asserted secular purpose does not withstand scrutiny. Petitioners contend that the displays serve to inform the public that the Ten Commandments provide the foundation for American Law. This claimed connection lacks any historical warrant.

That petitioners' avowed secular purpose reflects religious faith, not fact, is shown by the fallacious reasoning which leads them from the unremarkable observation that there are American laws prohibiting theft, perjury and unjustifiable homicide to the conclusion that these laws are necessarily derived from the Decalogue. History, sociology and common sense demonstrate otherwise. Every human community—including communities that had no contact with the ancient Hebrews—has had moral or legal prohibitions against murder, theft and deceit. Sissela Bok, *Common Values* (1995); H. L. A. Hart, *The Concept of Law* (1961). Consistency between American law and some of the prohibitions set forth in the Ten Commandments (at least as they are interpreted by petitioners) does not suffice to establish a causal relationship.

The absence of a causal relationship becomes even clearer when one distinguishes between petitioners' sanitized version of the Ten Commandments and the original understanding of the Ten Commandments. It is the contemporaneous understanding of the Ten Commandments at the time of their promulgation—that is, the understanding that Moses had of them—that fixes their true meaning. *Myers v. United States*, 272 U.S. 52, 175 (1926) (contemporaneous exposition of the Constitution by founders of our government fixes its meaning). The same books of the Bible that provide petitioners the Decalogue demonstrate that Moses did not regard

commandments such as "Thou shalt not kill" and "Thou shalt not steal" as prohibiting the killing and the dispossession of humans who did not share his religious views. *Exodus* 23: 23-30, 32: 25-29; *Deuteronomy* 7: 1-2. *See also Numbers* 31: 6-18. By contrast, American law has never allowed persons with unorthodox religious views to be deprived of their property or killed with impunity. In substituting their more congenial interpretation of the Ten Commandments for the original understanding of the Ten Commandments, petitioners are engaging in an ambitious revision of the Old Testament that Orwell's Big Brother would envy.

A similar disregard for both history and logic is manifested by petitioners' claim that the fact that some of the early colonists modeled some of their laws on the religious edicts in the Decalogue implies that American law is founded on the Decalogue. Petitioners want this Court to ignore the distinction between colonial law and American law, and to pretend that the Constitution and the Bill of Rights do not exist. The founding generation found the misguided efforts of some colonists to impose religious uniformity abhorrent, and these sentiments "found expression in the First Amendment." *Everson v. Board of Education*, 330 U.S. 1, 11 (1947). To the extent the founders used the religious edicts of Ten Commandments as an example, they were used as an example of what *not* to enact into law.

In short, to sustain petitioners' claim that the displays have a secular purpose, this Court must pretend that Jews and Christians are the only persons who have ever rejected theft, murder and deceit, that Moses is not a reliable guide as to how the Ten Commandments should be interpreted, and that America's founding generation embraced, rather than rejected, attempts by some colonists to oppress religious minorities. The Establishment Clause cannot be circumvented by inventing an alternative universe.

ARGUMENT

I. PETITIONERS' DISPLAYS OF THE TEN COMMANDMENTS USE THE GOVERNMENT TO IMPART RELIGIOUS DOCTRINE

The "central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Prominently displaying texts sacred to a particular religion or religions in courthouses or schools unambiguously informs the observer that the government favors certain beliefs. Such conduct by the government is impermissible under the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief").

This Court's prior decision in *Stone v. Graham*, 449 U.S. 39, 41 (1980), grounds any analysis of the constitutionality of the challenged displays. Stating the obvious, this Court observed that the "Ten Commandments are undeniably a sacred text in both the Jewish and Christian faiths and no . . . recitation of a supposed secular purpose can blind us to that fact." In the instant case, the U.S. Court of Appeals for the Sixth Circuit was not blinded to the religious character of the Ten Commandments. Accordingly, it correctly determined that the Ten Commandments displays serve primarily a religious purpose and are, therefore, unconstitutional. *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 453-54 (6th Cir. 2003).

A. Petitioners' Asserted Secular Purpose Reflects Religious Faith, Not Historical Fact

Of course, petitioners insist that the displays serve a secular purpose. They locate this purpose in the purported educational value of the displays. Petitioners' Brief at 9 (purpose of the displays is to "educate the public"). What they hope to

instruct the public on is the supposed truth of the claim that the Ten Commandments provide the "moral background" of the Declaration of Independence and the foundation of the American legal tradition. *McCreary County,* 354 F.3d at 454.

Curiously, however, despite petitioners' decision to predicate their avowed secular purpose on the educational value of the exhibit, petitioners are resistant to having the courts examine the factual basis for their claim that the Ten Commandments are the foundation of American law. Petitioners assert in their brief that the historical accuracy of the claimed connection between the Ten Commandments and American law is not at issue because the display could serve a secular purpose even if the claimed connection did not exist. Petitioners' Brief at 10-11. They state: "Petitioners' purpose is not to debate historians but to post a Display about law." *Id.* Petitioners' point is not well-taken. To maintain the displays are "about law" is mere question-begging unless the purported connection between the Ten Commandments and American law can be established. Petitioners' contention that this Court should not examine the accuracy of their claim betrays a seriously flawed understanding of this Court's Establishment Clause jurisprudence. Clearly, one way to distinguish a sham from a valid purpose is to determine whether the purported justification is based on faith or facts. Religious tenets cannot be forced on the public by masquerading them as science. *Edwards v. Aguillard,* 482 U.S. 578 (1987). Similarly, religious tenets cannot be forced on the public by masquerading them as historical fact.

Furthermore, as a matter of logic, petitioners' claims about history invite and require scrutiny. Petitioners have tried to fit a undeniably religious text into a secular mold by maintaining there is a critical, foundational connection between this religious text and secular law. They cannot simultaneously try to insulate this alleged connection from review by telling this Court it is none of its business whether there is historical

support for this connection. One could not justify posting Mormon tracts and texts in courthouses by the simple expedient of contending that the Book of Mormon is the foundation of American law. The Establishment Clause cannot be so easily circumvented.

This Court is no stranger to historical analysis. *See, e. g., Crawford v. Washington,* 541 U. S. 36, 124 S.Ct. 1354 (2004) (extensive historical analysis of origins of Confrontation Clause). Indeed this court has relied on its reading of history both to validate practices otherwise susceptible to an Establishment Clause challenge and to support a conclusion that a practice violates the Establishment Clause. *E.g., Marsh v. Chambers,* 463 U.S. 783, 790 (1983) (historical evidence critical for determining that legislative chaplaincies are constitutional); *Edwards v. Aguillard,* 482 U. S. at 590 (history of opposition to theory of evolution by various religious denominations relevant for determining whether statute has a predominantly religious purpose). Granted, there are historical claims that are difficult to resolve (for example: a conflict substantially similar to the Trojan War depicted in Homer actually took place), but there are also many historical facts that should be accepted by all reasonable individuals, even if there is some speculation to the contrary (for example: the Egyptian pyramids were built by human beings.) As shown below, petitioners' claim that the Ten Commandments is the foundation of our legal tradition cannot withstand a reasoned analysis. Indeed, it is not too strong to say this claim represents a gross distortion of history. With this pretext for the displays removed, petitioners' argument that the displays serve a secular purpose collapses.

In undertaking an historical analysis of the role played by the Ten Commandments in the American legal system, one must be careful to avoid mistakes that are all too evident in petitioners' arguments. Four errors in particular render petitioners' historical discussion useless as a guide for this Court.

First, one cannot prove an historical connection simply by quoting individuals, however distinguished, who assert there is such a connection. *Cf.* Petitioners' Brief at 11 n. 8. One must examine the facts upon which these individuals base their assertions. Second, it is a logical and sociological fallacy to assert that the Ten Commandments served as an actual model or exemplar for American law merely because the current understanding of some of the commandments is consistent with various American laws. Prohibitions of theft, deceit and unjustified homicide are found in every culture, past and present. Third, to establish that the Ten Commandments provide the foundation for American law, precision about the proper interpretation of the Ten Commandments is indispensable. Plaintiffs fail to consider the striking differences between the current understanding of the Ten Commandments within their religion and the contemporaneous interpretation of the Decalogue by Moses. Obviously, the manner in which Moses interpreted the Decalogue is critical for fixing its true meaning and for determining what influence, if any, the Decalogue had on American law. *See Myers v. United States,* 272 U.S. 52, 175 (1926) (contemporaneous exposition of the Constitution by founders of our government fixes its meaning). Finally, one cannot equate the laws of British colonies, some of which, such as Massachusetts, operated for a time as theocratic states, with American law, especially when American law represented, in part, a rejection of these colonial precedents. Once the palpable errors in petitioners' historical discussion are removed, there can be no tenable argument that the Ten Commandments provide the foundation for American law.

B. Petitioners Rely on Unsubstantiated Assertions About the Foundational Role of the Ten Commandments, Which Historical Analysis Proves Mistaken

Petitioners place significant weight on quotations from a number of jurists who have speculated about the role of the Ten Commandments in the development of American law. Petitioners' Brief at 11, 21. For example, petitioners quote Chief Justice Rehnquist's dissent from the denial of certiorari in *City of Elkhart v. Books,* 532 U.S. 1058, 1059 (2001), in which the Chief Justice referred to the "foundational role of the Ten Commandments in secular, legal matters." *Id.* at 1062. However, the Chief Justice cited no authority to support this claim. In the Chief Justice's prior dissent in *Stone v. Graham,* 449 U. S. at 43-47, the Chief Justice did cite to the opinion of the U. S. Court of Appeals for the Tenth Circuit in *Anderson v. Salt Lake City Corp.,* 475 F.2d 29, 33 (10th Cir. 1973), as support for a similar proposition. However, a review of *Anderson* itself indicates that the Tenth Circuit used as sole evidence for its conclusion about the secular importance of the Ten Commandments the vague remark of one of the *Anderson* plaintiffs that "'the Ten Commandments is an affirmation of at least a precedent legal code.'" 475 F.2d at 33. That the Ten Commandments are, in some sense, a portion of a proto-legal code is not in dispute. What is disputed is whether the Ten Commandments provide the foundation for the American legal system. Tracing the Chief Justice's observations back to their apparent source reveals that, while they were undoubtedly motivated by a desire for accuracy, they lack adequate and reliable support.

A similar analysis could be carried out on all the various observations and remarks quoted by petitioners. Opinions of this Court and other American courts, especially those dating to a time prior to the development of modern Establishment Clause jurisprudence, provide fertile ground for offhand

observations about the importance of the Ten Commandments, the Bible or Christianity to the development of the law. It is, for example, notoriously true that this Court once declared, more than a century ago, that the United States "is a Christian nation." *Church of the Holy Trinity v. United States*, 143 U. S. 457, 471 (1892). However, none of these opinions provides anything resembling a careful historical analysis of the role of the Ten Commandments, the Bible or Christianity in the development of American law, instead relying principally, if not exclusively, on what prior judicial decisions said about the importance of the Ten Commandments, the Bible or Christianity. Essentially, the various quotations on which petitioners rely amount to nothing more than an judicial chain-letter extended over dozens of decades in which one jurist relies on another jurist's comments as authority for a dubious proposition, without anyone ever bothering to examine the underlying factual support for this proposition. Repeating an opinion does not convert it into reality. As one jurist has noted, "no amount of repetition of historical errors in judicial opinions can make the errors true." *Wallace v. Jaffree,* 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting). Establishment Clause jurisprudence should not be erected on a house of cards.

Fortunately, there has been some historical analysis of the claim advanced by petitioners, and that analysis establishes that "[t]he historical record fails to support claims of a direct relationship between the law and the Ten Commandments." Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law,* 14 J. L. Religion 525, 558 (1999-2000). Professor Green points out that English common law relied primarily on custom, not the Decalogue or the Bible. *Id.* at 532. Moreover, the founders of the *American* government (as distinguished from British colonies) relied on "Enlightenment thinkers such as Locke, Pufendorf and Grotius for inspiration." *Id.* at 544. Other well-respected scholars have reached similar conclusions.

See, e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* 27 (1967) ("The ideas and writings of the leading *secular* thinkers of the European Enlightenment—reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts such as Montesquieu—were quoted everywhere in the colonies, by everyone who claimed a broad awareness.") (emphasis added).[2]

Significantly, petitioners also overlook entirely the contributions of Roman law to both British and American law. This oversight is very relevant to petitioners' claims because Roman law developed independently of Judaism or Christianity.[3] Although the precise extent to which Roman law influenced British and, subsequently, American law remains a matter of controversy, that it had a significant influence does not seem open to question. *See, e. g.*, Richard H. Helmholz, *Canon Law and the Law of England* (1987); Richard H. Helmholz, *Magna Carta and the ius commune,* 66 U. Chi. L. Rev. 297 (1999). Furthermore, a survey of this Court's decisions reveals many instances in which Roman law has been referenced as supplying at least part of the rationale for a decision. *See, e.g., Crawford,* 124 S.Ct. at 1359; *Roe v. Wade,* 410 U.S. 113, 130 (1973); *Van Beeck v. Sabine Towing Co.* 300 U.S. 342, 344-45 (1937); *Cubbins v. Mississippi River Comm'n,* 241 U.S. 351, 363-66 (1916); *Geer v. Connecticut,* 161 U.S. 519 (1895); *Coffin v. United States*, 156 U.S. 432, 450-55 (1895). By contrast, it is not clear whether the Ten Commandments have ever supplied part of the rationale for a decision by this Court.

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[2] Bailyn's book, winner of the Pulitzer and Bancroft prizes, has been previously cited by this Court as an authority on the thoughts and concerns of this nation's founders. *See, e.g., Larkin v. Grendel's Den,* 459 U.S. 116, 127 n. 10 (1982); *Larson v. Valente,* 456 U.S. 228, 244 (1982).

[3] Obviously, after the reign of Constantine, Roman law began to reflect some Christian precepts. But by that time Rome had been a nation for centuries.

C. Consistency with Secular Laws Does Not Prove That the Ten Commandments Are the Source of These Laws

As suggested by arguments in their brief, petitioners would undoubtedly reject this last contention, maintaining that our laws against various forms of theft, unjustified homicide, and perjury mirror and, therefore, can be traced to some of the commands of the Decalogue. Petitioners' Brief at 26-27. Here, petitioners commit an error that is fatal to their historical claims as well as being very revealing about both the purpose and effects of their displays. Petitioners effectively argue that because many laws are consistent with their understanding of the Ten Commandments, that implies these laws are based on the Ten Commandments. This contention truly establishes that petitioners are viewing history through the prism of faith.

All or virtually all human societies have had moral or legal prohibitions against unjustified killing, theft and deceit. "[I]njunctions against violence, deceit and betrayal . . . are familiar in every society and every legal system. They have been voiced in works as different as the Egyptian Book of the Dead, the Icelandic Edda, and the Bhagavad-Gita." Sissela Bok, *Common Values* 15 (1995). Any community in which such minimal rules were lacking would be extremely short-lived. Given human vulnerabilities, some rudimentary principles of cooperation are indispensable. "In every well-functioning society norms are in place to prohibit lying, breaking promises, causing bodily harm, stealing, fraud, the taking of life, the neglect of children and failures to keep contracts." Tom. L. Beauchamp, *A Defense of the Common Morality,* 13 Kennedy Instit. of Ethics Journal 259, 261 (2003). *See also* Peter Singer, *The Expanding Circle* (1981). The leading jurisprudential scholar of the last hundred years stated unequivocally that the law has a certain minimum content. H.L.A. Hart, *The Concept of Law* 189 (1961). There

is a common element in the law of all societies because "any social organization must contain [these rules] if it is to be viable." *Id.* at 188.

From the foregoing, it is readily apparent that the mere consistency between the petitioners' understanding of some of the Ten Commandments (that is, the ones that do not prescribe specifically religious duties) and American laws does *not* establish a causal relationship. Sumerian society, the civilizations of ancient Egypt, China and Greece, Rome, the Inca Empire, etc. all have had laws prohibiting unjustified homicide, theft and materially significant deceit. Furthermore, no society could survive without such rules. In attributing to the Ten Commandments laws that are the common heritage of civilized society, petitioners are attempting to elevate their religion to a special status. They are maintaining that society would dissolve into anarchy were it not for the Ten Commandments. Such a claim is not only historically and sociologically preposterous, but it underscores the transparently religious nature of the displays. Petitioners are not using the displays to educate the public (unless "educate" is synonymous with "misinform"), but to proselytize by suggesting to the public that they must adhere to the Ten Commandments lest society collapse.

Of course, if petitioners could show that the Ten Commandments should be interpreted in a way that distinguishes them from the common content of law found in all societies *and* that these differences provide the foundation of American law, then perhaps some credence could be given to their claim. Arguably, by analyzing the interpretation and application of the Ten Commandments by Moses, they could show the former, but it would be impossible for them to show the latter. The Council and the Academy now turn to an examination of the Ten Commandments as they were interpreted and applied by Moses.

D. The Interpretation Given the Ten Commandments by Moses Would Be Rejected and Condemned by Today's Americans As Well As Americans of the Founding Generation

One cannot cogently argue that X provides the foundation for Y if one is not even clear what X is. Incredibly, petitioners expend virtually no time addressing the content and implications of the Ten Commandments, assuming they are a given. This, of course, reinforces the point that petitioners are advancing their particular religious viewpoint through their displays. Perhaps within petitioners' religious tradition the meaning of the Ten Commandments is clear, but different traditions have interpreted these commandments differently. An abstract prohibition of "killing" does not provide serviceable moral or legal guidance. One must be clear about who is protected by this prohibition. As one perceptive jurist has noted, what counts as an unjustified killing "varies enormously from society to society." Richard A. Posner, *The Problematics of Moral and Legal Theory* 6 (1999).

Insisting that this Court attend to the differences in interpretation of the Ten Commandments is not a mere quibble. Leaving aside the different wording and numbering of the commandments among different religions,[4] there are striking differences between the way in which petitioners appear to interpret the commandments, in particular the ones that do not deal with strictly religious obligations, and the way in which Moses interpreted them. For example, even a cursory review of the Bible, which, of course, is our source for the Decalogue, establishes that Moses did not include all humans within the scope of the commandments "Thou shalt not kill" and "Thou shalt not steal." The commandments were in-

[4] We do not mean to discount the significance of the differences in the numbering and wording of the commandments, but this point has been adequately addressed in other briefs.

tended to govern relations within the community of the ancient Hebrews; they did not protect those living outside the Hebrew community.[5] This contemporaneous construction of the Ten Commandments, that is the Ten Commandments as applied by Moses, fixes their true meaning. *See Myers v. United States,* 272 U.S. at 175 (contemporaneous exposition of the Constitution by founders of our government fixes its meaning). *See also Utah v. Evans,* 536 U. S. 542, 503 (2004) (Thomas, J., dissenting) (same). Once the true meaning of the commandments is fixed by the words and deeds of Moses, any claim that they provide the foundation for American law ceases to be credible.

The Bible reveals that not long after Moses received the Ten Commandments and promulgated them to the ancient Israelites, Moses showed how narrowly the injunction not to kill should be applied. Specifically, after Moses directed the Israelites to attack and slaughter a people known as the Midianites, he was angry when his warriors returned with more captives than he thought necessary. Moses stated:

> Now therefore, kill every male among the little ones, and kill every woman who has known man by lying with him. But all the young girls who have not known man by lying with him, keep alive for yourselves.

Numbers 31: 17-18. An adjacent passage in *Numbers* sheds light on Moses' interpretation of the commandment "Thou shalt not steal." Again, the protections of this commandment

[5] Significantly, the Decalogue is introduced by God's statement that "I am the Lord your God, who brought you out of the land of Egypt, out of the house of bondage." *Exodus* 20:2. This statement makes it clear that the Ten Commandments form part of the covenant between God and the people of Israel.

All quotes from the Bible are from the New Revised Standard Version found in *The New Oxford Annotated Bible* (Herbert G. May and Bruce M. Metzger eds.) (1977).

did not extend to those outside the covenant between the Israelites and their deity:

> And the people of Israel took captive the women of Midian and their little ones; and they took as booty all their cattle, their flocks and all their goods.

Numbers 31: 9.

Indeed, almost immediately after Moses received the commandments from his deity, Moses and the Israelites embarked on a ruthless war of aggression to occupy land already inhabited by other peoples. Moses understood this war to be expressly sanctioned by his deity:

> When my angel goes before you, and brings you in to the Amorites, and the Hittites, and the Perizzites and the Canaanites, the Hivites, and the Jebusites and I blot them out, you shall not bow down to their gods, nor serve them, nor do according to their works, but you shall utterly overthrow them and break their pillars in pieces . . . I will send my terror before you, and will throw into confusion all the people against whom you shall come, and I will make all your enemies turn their backs to you. And I will send hornets before you, which shall drive out Hivite, Canaanite, and Hittite from before you . . . Little by little I will drive them from before you, until you are increased and possess the land.

Exodus 23: 23-30. *See also Deuteronomy* 7: 1-2 (Israelites instructed to show no mercy to the Canaanites, et al. after taking possession of their land). Today, we would undoubtedly consider an unprovoked war with the aim of dispossessing entire groups of people to be a horrible crime; it is what is euphemistically referred to as "ethnic cleansing." Moreover, although the founders of our nation may have lacked some of our sensitivities, there is no record of Washington, Jefferson, Franklin, Madison and others of this generation accepting Moses' conduct as a model for their

personal behavior or the legal relations between the United States and other nations. The Louisiana Territory was purchased by the United States, not stolen from France. When the United States acquired territories from other nations, the property rights of those already in these territories was respected. *United States v. Percheman,* 32 U.S. 51 (1833) (observing that the "sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated" upon the acquisition of foreign territory by the United States).[6]

The circumscribed scope of the commandments affects the interpretation of other prohibitions as well. The commandment not to "bear false witness against your neighbor" necessarily excludes the Canaanite, Hittite, et al. who, despite their geographical proximity, were clearly not regarded as the "neighbors" of the Hebrews. Moreover, the prohibition on adultery did not preclude sexual exploitation of conquered peoples. Moses' instruction to "kill every woman who has known man by lying with him" but to "keep alive for yourselves" the "young girls who have not known man" (*Numbers* 31: 17-18) was not, presumably, a way of selecting women based on their cooking skills.

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[6] Some may contend that the troubled relations between our nation and Native Americans proves that Moses' interpretation of the Ten Commandments did serve as a model for American law. However, although the actions of European explorers and early colonists were often adverse to the interests of Native Americans, the official policy of the United States after its founding as a nation respected the rights of Native Americans (at least in theory). Accepting the earlier conquest as a *fait accompli,* the United States policy thereafter was that Native Americans could be removed from land only through negotiation, not forcible dispossession. *See Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 273-74 (1955) (policy of Congress "throughout our history" has been to extinguish Indian title through negotiation rather than by force).

Even the command to honor one's father and mother is connected with the belief that the Israelites were entitled to take possession of the land of other peoples. The text of this commandment, as found in the Bible, is: "Honor your father and mother, that your days may be long in the land which the Lord your God gives you." *Exodus* 20:12. Petitioners cite no examples of American laws which make discharging obligations to one's parents a condition precedent to the acquisition of real property.

That the Ten Commandments form an inextricable part of the covenant between the Israelites and their deity is also demonstrated by the treatment of Israelites who violated key terms of the covenant, in particular the obligation to worship their deity exclusively. Everyone is familiar with the story of the Israelites who decided to worship a golden calf while Moses was absent. Less familiar is the conclusion of that story, in which Moses, the transmitter of the prohibition not to kill, ordered his loyalists to go "throughout the camp, and slay every man his brother, and every man his companion, and every man his neighbor," with the result that "there fell . . . that day about three thousand men." *Exodus* 32: 27-29.

In pointing out that Moses' interpretation of the Decalogue is starkly distinct from petitioners' apparent interpretation of similar prohibitions, we mean no disrespect to those who venerate Moses as a lawgiver and religious leader. Retrospective moral judgments—especially ones concerning the conduct of individuals who lived millennia ago—are always questionable. The ancient Middle East was not exactly a haven of peace and tranquility and goodwill among all peoples. Among almost all ancient peoples, moral and legal norms protected members of one's own tribe, clan or community; no comparable restraints protected individuals belonging to other groups. So Moses was no worse than any other leader, and in some ways he was more enlightened than many of his time. *Deuteronomy* 23: 15-16; 24: 16-18 (forbidding return of runaway slaves and exploitation of "sojourners," the fatherless, and widows and rejecting the notion of collective responsibility).

Nonetheless, petitioners should not be allowed to pass off their sanitized rendition of the prohibitions set forth in the Ten Commandments as *the* Ten Commandments, and then use this Disney version as a means of government-sponsored religious recruitment. This Court should not countenance such a gross distortion of history as is suggested by petitioners' claim that Moses' Ten Commandments provide the foundation for American law.

E. The New American Nation Repudiated Efforts by Some Colonies to Model Laws on the Decalogue

Petitioners' brief cites various examples of how some of the British colonies in North America arguably modeled some of their legislation on the Ten Commandments. For example, petitioners cite to a 1641 Massachusetts law banning the worship of "any other god but the Lord God" and a similar New Hampshire law from 1680 prohibiting "idolatry." Petitioners' Brief at 23-24. Petitioners are on somewhat more solid footing with this claim as it is historically correct that *some* colonies, especially early Massachusetts, made an explicit attempt to incorporate *some* portions of the Decalogue—in particular the commandments relating to religious practices—into their legal codes. Green, *The Fount of Everything Just and Right* at 536-43. Regrettably, some of the early colonists did desire theocratic instead of democratic government.

However, these attempts to incorporate portions of the Decalogue were abandoned in the 1700's and then decisively rejected by the United States once it became a nation. *Id.* at 542-43 ("Significantly, the failed experiment in Puritan New England, over by the 1690s, would be as close as the nation

would ever come to a legal system based on the Decalogue."). As this Court has observed, the feelings that "found expression in the First Amendment" were feelings of indignation and abhorrence at the efforts of some in the colonies to impose religious uniformity. *Everson v. Board of Education,* 330 U.S. 1, 11 (1947). Moreover, fresh in the minds of the founders was the history of the immediately preceding centuries, which were "filled with turmoil, civil strife and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Id.* at 8-9. It was in this attempt to maintain religious supremacy that laws forbidding "idolatry" were adopted, and it was precisely such intolerant legislation that the Establishment Clause was designed to foreclose. Furthermore, it is no accident that the Constitution itself contains no invocations of or references to deities and expressly forbids any religious test for public office. U.S. Const., art. VI. From the beginning of our existence as a nation, "idolaters" have been free to hold public office.

Therefore, the influence of the Ten Commandments on American law was, in this context, largely negative. One cannot prove that the Ten Commandments constitute "the foundation" of the American legal system by citing examples of colonial religious edicts that were repudiated by the Constitution and the Bill of Rights any more than one can prove that the British monarchy constitutes "the foundation" of America's democracy by the references to the abuses of King George in the Declaration of Independence.

* * * *

Proving that an asserted purpose is a sham purpose can be accomplished in several different ways. For example, one can show that the asserted purpose is inconsistent with other statements or contentions made by the party. One can also show that the asserted purpose is nothing more than a post-hoc rationalization. *See Santa Fe Indep. Sch. Dist. v. Doe,*

530 U.S. 290, 315 (2000). Petitioners' avowed secular purpose fails for both of these reasons. *McCreary County*, 354 F.3d at 457. However, one can also show that an asserted purpose is a sham by proving that it is wholly lacking in credibility. Petitioners' claim that their displays serve the secular purpose of educating the public regarding the foundational role of the Ten Commandments for American law asks this Court to pretend that Jews and Christians are the only persons who have ever rejected theft, murder and deceit, that the belligerent actions ascribed to Moses in the Bible must have been carried out by someone impersonating the Moses who promulgated the Ten Commandments, and that America's founding generation embraced, rather than rejected, the misguided efforts of some colonists to oppress religious minorities. A preposterous claim cannot substitute for a genuine secular purpose. Petitioners' displays violate the Establishment Clause.

II. PETITIONERS' DISPLAYS CONSTITUTE AN IMPERMISSIBLE ENDORSEMENT OF A PARTICULAR RELIGIOUS FAITH

The Establishment Clause prohibits the government from sponsoring a religious message, in part "because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Through their inclusion of documents such as the Bill of Rights in their Ten Commandments displays, petitioners manage only to magnify the extent of government endorsement of their religious message. *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000). Indeed, petitioners' sham secular justification for the displays both reveals what they really want to accomplish

and foreshadows what they likely will accomplish if their displays are allowed to remain in the courthouses. Petitioners want to appropriate the symbols of our government and link them with their religious message through the fiction that the Ten Commandments provide the foundation for American law. As already demonstrated, petitioners' claimed historical connection is, to put it charitably, unsupported by a scintilla of credible historical evidence. Yet by using their displays to associate the Bill of Rights and other secular documents with their religious texts, petitioners will surely be able to convince many that their fiction is fact and that their religion does have a special relationship with government. One must grudgingly admit that this is a neat trick if petitioners can pull it off: to use the Bill of Rights to validate a government-sponsored religious message when it was precisely the government sponsorship of religious messages that the Establishment Clause was intended to prevent.

Of course, the placement of these displays in courthouses, "where the government carries out one of its quintessential functions," *McCreary County*, 354 F.3d at 461, similarly intensifies the government's endorsement of petitioners' religious message. This Court has recognized the importance of ensuring equal access to our nation's courthouses. *See Tennessee v. Lane*, 124 S.Ct. 1978 (2004). While petitioners' displays do not serve to bar religious dissenters physically from the courthouses, they serve as a more significant impediment, namely to the possibility of religious dissenters obtaining equal justice in these courthouses. Not only do the displays send a message to all those who do not accept the Ten Commandments as part of their religious beliefs that they are second-class citizens, but they will likely affect the perception of religious dissenters by those who do accept the Ten Commandments. When an atheist witness insists on his right to affirm, rather than swear, how will the religious majority regard his testimony after being informed on a daily

basis throughout the course of a trial that our perjury laws are based on the commands of a deity the atheist does not acknowledge?

The concern that agnostics, humanists and atheists will experience substantial adverse effects from petitioners' displays is not speculative. Prejudice against nontheists has deep roots in this country and courthouse doors have been effectively closed to nonbelievers in the past. Earlier in our history, when the Establishment Clause did not apply to the states, many states did not permit atheists to testify, precisely because they were considered inherently immoral and unworthy of belief. *E.g., Jackson v. Gridley*, 18 Johns. 98 (N.Y. 1820). Some of these prohibitions continued into the 20th Century. *See* Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 Yale L. J. 659, 667-68 (1930). Although official legal burdens on nontheists have been removed, the hostility towards them remains. Indeed, the animosity toward them is still so intense that sociologists routinely study a group's attitudes towards atheists—along with Nazis—as a way of measuring that group's levels of tolerance. Fredric D. Weil, *Tolerance of Free Speech in the United States and West Germany, 1970-79*, 60 Social Forces 973 (1982). *See also* Hugh Whitt and Hart M. Nelsen, *Residence, Moral Traditionalism and Tolerance of Atheists*, 54 Social Forces 328 (1975). Recent surveys confirm that the last respectable prejudice in this country is bigotry toward nontheists. A poll commissioned by the Pew Charitable Trust shows that only 49% of Americans would consider voting for an atheist for president, whereas 95% would vote for an African-American, 92% would vote for a woman, 92% for a Jewish candidate and 59% for a homosexual. Public Agenda, *For Goodness' Sake: Why So Many Americans Want Religion to Play a Greater Role in American Life*, 37-38 (2001).

The primary source of this hostility is the common belief that morality must be based on God's commands, with the consequence that many view atheists and other religious skeptics as incapable of moral behavior. *See Kurtz v. Baker*, 644 F. Supp. 613, 615, 623 (D.D.C. 1986) (discussing prayers offered by Senate Chaplain Halverson, which asserted, *inter alia,* that the godless have no concern for human rights). *See also* Cong. Rec. H 1209 (daily ed. March 6, 1984) (remarks of Rep. Siljander) (asserting that humanists have no morality because they do not believe in God and, therefore, approve of the rape of young girls).[7] By falsely proclaiming that belief in God is essential to the rule of law, petitioners' displays serve to strengthen and inculcate this prejudice.

The notion that moral and legal norms should protect all humans, instead of merely those within one's tribal, religious or national community, is a fairly recent development in human history, as the previous discussion of the Old Testament illustrates. See Singer, *The Expanding Circle* 50-51, 111-13. Many would credit the European Enlightenment for the broad acceptance of the view that there are *human* rights, and that all humans should fall within the scope of our moral and legal norms. *Id.* at 114. Whatever the explanation, it is fortunately true that respect for the lives, liberty and property of others is a sentiment that now is not usually confined to one's own religious or ethnic group. What inspires a person to accept the universality of ethics and the law is not important. To the extent the Ten Commandments inspire individuals to embrace appropriate moral ideals, they are to be welcomed, just as the Sermon on the Mount, the Koran, the Bhagavad-Gita, the Analects of Confucius, the wisdom of Buddha and the moral philosophy of John Locke, David Hume or Immanuel Kant should be welcomed when they inspire individuals to treat others with appropriate respect and

[7] *Cf. Numbers* 31:17-18 (discussing how Moses dealt with young female captives).

consideration. But to proclaim that the Ten Commandments provide *the* foundation for our morality and law is not only irreconcilable with history, but it also threatens to take us back to an era when norms were less inclusive - - when the atheist, the Hindu, the Muslim and other "outsiders" were not considered part of the moral community, and could be treated accordingly. The Court should not allow the government to give a privileged position to petitioners' religious views.

CONCLUSION

For all the foregoing reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 03-1693

IN THE
Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, ET AL.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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DEC 8 - 2004
OFFICE OF THE CLERK
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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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No. 03-1693

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right to publicly display the Ten Commandments.

SUMMARY OF ARGUMENT

The *Lemon* test has proven unworkable and restricts religious liberty in a manner that is inconsistent with the original meaning of the First Amendment. The Establishment Clause was originally viewed as a federalism provision that protected state establishments from interference by the federal government. The Framers wisely recognized that the individual states should remain free to adopt diverse practices with respect to religion without the threat of an established church at the national level. The *Lemon* test is inconsistent with this original understanding. It interjects the federal government into state decisionmaking in a manner that restricts religious liberty.

Even under the *Lemon* test, however, the Ten Commandments displays at issue here are constitutional. This Court has recognized in decisions such as *Marsh v. Chambers* that governmental action that has both religious and historical significance does not violate the Establishment Clause. Indeed, even in *Stone v. Graham* where the Court held that a particular Ten Commandments display ran afoul of the establishment prohibition, it further held that the Ten Commandments could be displayed as long as their historical significance was conveyed along with their religious meaning. The displays at issue here conveyed both a historical and religious meaning. Accordingly, they do not violate the Establishment Clause under the test set out in *Lemon*.

The lower court's ruling to the contrary was based on a misapplication of this Court's precedents. The lower court concluded that the displays violated the Establishment Clause only after engaging in a highly speculative analysis concerning the subjective intentions of the proponents of the displays. The test under *Lemon*, however, is an objective one, focusing on whether a "reasonable observer" would understand the display to constitute an "establishment" or "endorsement" of a particular religion. Should the Court retain the *Lemon* test despite its many flaws and lack of historical foundation, it should clarify that the constitutional test under *Lemon* is an objective one.

ARGUMENT

I. The *Lemon* test is inconsistent with the original meaning of the Establishment Clause and has resulted in confusion.

The *Lemon* test has proven unworkable. It has caused confusion among the lower courts and led to curtailment of religious expression that was never contemplated by the Framers of the Establishment Clause.[2] It should be

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[2] *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2327 (2004) (Thomas, J., concurring in judgment) (noting the "difficulties with our Establishment Clause cases"); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this Court."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in judgment) (noting "the long list of constitutional scholars who have criticized *Lemon*"); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (*Lemon* "has received well-earned criticism from many Members of this Court"); *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (refusing to "adopt[] [the *Lemon*] test as our primary guide in [holiday display cases]"); *Corp. of the Presiding Bishop of the*

abandoned in favor of a test that is more faithful to the original meaning of the First Amendment.

A. The *Lemon* test has caused confusion among the lower courts.

Under the three-part test articulated by the Court in *Lemon*, governmental action is constitutional if it has a "secular" purpose, its "principal or primary effect" is one that "neither advances nor inhibits religion," and it does not "foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). In certain contexts, the entanglement prong may be considered as an aspect of the effects inquiry. *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). Governmental actions that run afoul of *any* of these three prongs may be barred as unconstitutional under this test. The test has proven particularly problematic given that each element is highly malleable and is subject to a multitude of inconsistent and confusing constructions.

In determining whether government action has a "secular purpose," for example, courts have relied on the subjective intentions of the authors of government action to a greater or lesser extent. Insofar as these subjective intentions guide the constitutional analysis, the potential for disparate outcomes increases as different judicial entities are called upon to review similar government actions. *See Wallace v. Jaffree*,

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Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment) (noting the "difficulties inherent in the Court's use of the test articulated in *Lemon*"); *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in the judgment) ("Despite its initial promise, the *Lemon* test has proved problematic."); *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (noting the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (observing that the secular purpose prong "has proven mercurial in application").

Similarly, courts take different approaches in determining whether government action "advances" or "inhibits" religion. Often courts do not take sufficient account of the inhibitory nature of governmental conduct on religion or are overly deferential to government actors when the question is whether they are inhibiting religious practices. As a result, courts have upheld governmental actions that are openly hostile to religion or religious belief. *See, e.g., American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1119, 1122 (9th Cir. 2002) (upholding resolution denouncing the "Religious Right" and various religious organizations for their position on the morality of homosexuality after concluding that there was "little guidance concerning what constitutes a primary effect of inhibiting religion").

Finally, there are disparate approaches to what constitutes "excessive" entanglement given that "[e]ntanglement is a question of kind and degree." *See Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). Some courts take a deferential view, while others take a more rigid approach. Lacking sufficient guidance, the lower courts are left to "puzzle through this analysis" on their own. *See Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 497 (5th Cir. 2001) (en banc) (Wiener, J., concurring in part and dissenting in part) ("[T]o date the Supreme Court has offered scant guidance as to what quality and quantity of entanglement is excessive.").

The fact that this Court has refused to apply a "single test or criterion" in analyzing purported Establishment Clause violations has only added to the confusion. *See Lynch*, 465 U.S. at 679. Not only are courts unsure how to apply the factors identified in *Lemon*, but they are unsure whether and to what extent those factors apply in individual cases.

Moreover, even in cases where the *Lemon* factors apply, the test "has caused this Court to fracture into unworkable plurality opinions, . . . depending upon how each of the three factors applies to a certain state action." *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting). The result has been a string of decisions that are difficult to reconcile.

In sum, the *Lemon* test does not provide the well-defined rules that are required to give the lower courts and government actors clear guidance as to what is constitutionally permissible state action. As such, it only encourages wasteful, expensive, and divisive litigation.

B. The lower courts invoking *Lemon* have prohibited religious expression that the Framers never thought constituted an "establishment" of religion.

More significantly, as a result of confusion among the lower courts applying *Lemon*, there have been instances in which state action that was never thought to constitute an "establishment" of religion has been prohibited. Thus, for example, courts have barred a reference to God in the pledge of allegiance, *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2301 (2004), prayers opening town council meetings that mention Jesus Christ, *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Cir. 2004), and a Ten Commandments monument erected on *private* land sold to a fraternal organization by a city government, *Mercier v. City of LaCrosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004).

As a result, the *Lemon* test often has interfered with religious expression. This Court has emphasized that "the common purpose of the Religion Clauses 'is to secure religious liberty.'" *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). It has recognized that religious speech is protected to an equal extent whether on government or

private property. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Nonetheless, the test the Court outlined in *Lemon* has often resulted in an overt hostility to religious expression, thereby bringing the courts "into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Lynch*, 564 U.S. at 673 (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948)). *See also Edwards v. Aguillard*, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting) ("We have not yet come close to reconciling *Lemon* and our Free Exercise cases, and typically we do not really try.").

Moreover, the chilling effect of potential litigation on public religious expression has been significant.[3] Because the *Lemon* test does not provide clear guidance, state actors are often inclined to prohibit religious expression rather than face the possibility of costly and protracted litigation. Thus, not only is the *Lemon* test overly restrictive of religious expression on its face, but in its application it often has practical effects that the Court never intended.

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[3] *See, e.g., Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Professor Vincent Phillip Munoz), *available at* http://judiciary.senate.gov/testimony.cfm?id=1218&wit_id=3523 ("The law's vagueness makes state acknowledgement of religious sentiment suspect. It enables special interest litigators, who are professionally hostile toward religion, to file lawsuits to challenge almost any state action that accommodates religion. The chilling effect of such litigation and the mere threat [of] it is considerable. . . . Fearful local officials and public school administrators have the incentive to eliminate the public acknowledgement of religious sentiment in order to avoid costly litigation."); *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 49, 51-52 (1996) (testimony of William A. Donohue, Catholic League for Religious and Civil Rights) (maintaining that the potential for lawsuits has "create[d] a chilling effect on the free speech rights of the Catholic clergy" and that confusion about the status of the law has created "religious-free zones").

C. The *Lemon* test is based on a flawed historical metaphor.

At bottom, the problems with the *Lemon* test are directly traceable to its lack of historical support. The test is premised on the notion that the First Amendment creates a "wall of separation" between church and state. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). These terms, however, are nowhere found in the constitutional text. Moreover, this concept of church-state relations is at odds with the historical record. "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*.'" *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).[4] Rather, they contemplated that there would be a healthy interaction between religion and government.[5]

Indeed, this Court has acknowledged that "[t]he metaphor of a 'wall' or impassible barrier between Church

[4] *See also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002) ("As should be clear from the contrast between separation and the religious liberty guaranteed by the First Amendment, the constitutional authority for separation is without historical foundation."); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 485 (1991) ("With little or no support from text, history, or tradition, the members of the *Everson* Court braided into the Religion Clause the notions that the establishment provision was meant to create a 'wall of separation' between religion and the government, that it was to be broadly construed to prohibit all government aid to religion, and that government was required to be strictly neutral as between religion and nonreligion.").

[5] *See, e.g.*, MASS. CONST. OF 1780, art. III (observing that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality" and that "these cannot be generally diffused through a Community, but by the institution of the publick worship of GOD, and of publick instructions in piety, religion, and morality").

and State, taken too literally, may mislead constitutional analysis," *Gillette v. United States*, 401 U.S. 437, 450 (1971), and that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state," *Lynch*, 465 U.S. at 673. Even in *Lemon*, the Court observed that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." 403 U.S. at 614. The experience under *Lemon*—a history that is marked by controversy and confusion—has demonstrated that the test is inherently flawed.

II. The Establishment Clause was originally understood as a federalism provision.

The difficulties associated with the *Lemon* test may largely be avoided by returning to an interpretation of the Establishment Clause that is more consistent with its original meaning. "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring in judgment).[6] As such, the clause merely reiterates the fundamental division of power embodied in the original Constitution. The federal

[6] *See also Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (Establishment Clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations"); *Lee*, 505 U.S. at 644 (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting) (Establishment Clause "was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments").

government was not delegated the authority to establish a national church. Nor was it given the authority to interfere with the state establishments.

A. The Establishment Clause prohibits federal interference with state establishment of religion.

The Establishment Clause provides that Congress shall pass no law "respecting an establishment of religion." U.S. CONST. amend. I. The term "respecting" was understood as being synonymous with the term "relating." *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773). To "establish" meant "[t]o settle in any privilege or possession; to confirm." *Id.* A "privilege", in turn, was understood as a "[p]eculiar advantage," an "[i]mmunity", or a "publick right." *Id.*

Thus, the text suggests that the Establishment Clause was designed to prohibit Congress from passing any law that would uniquely privilege a single religion by establishing it at the national level. *See Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring in judgment). Such uniformity would interfere with the religious liberty found in the several states, which took diverse approaches to religious worship and establishment of particular churches. The text, however, "does not purport to protect individual rights." *Id.* Rather, it is a structural provision that prohibits the federal government from undertaking certain prohibited actions. As such, it is not subject to incorporation against the states pursuant to Section One of the Fourteenth Amendment. Indeed, incorporation of the Establishment Clause would "lead[] to a peculiar outcome"—i.e., "[i]t would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion." *Id.* at 2331 (emphasis added).[7]

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[7] *See also Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) (incorporation of the clause would lead to the "irony that a constitutional provision evidently designed to leave the States free to go their own way

The history of the clause further confirms this construction. When the amendment was proposed and ratified, several of the states maintained established churches. *Id.*; AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-33 (1998). Nonetheless, the approaches to public measures regarding religion varied widely from state to state. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 11 (1994).[8] While some states had exclusive establishments, authorizing only a single established church, a few states provided for multiple established religions. *See, e.g.*, S.C. CONST. OF 1778, art. XXXVIII (providing a mechanism by which religious societies could become "established" and "enjoy equal Privileges"); VT. CONST. OF 1777, art. XLI ("all religious societies" shall be "encouraged and protected"). Other states, in contrast, prohibited the establishment of any church in preference to another. *See, e.g.*, N.J. CONST. OF 1776, art. XIX ("[T]here shall be no Establishment of any one Religious Church or denomination in this State in Preference to any other.").

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should now have become a restriction upon their autonomy"); AMAR, *supra*, at 41 ("As a more pure federalism provision, then, the establishment clause seems considerably more difficult to incorporate against states."); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 95 (1987) (incorporation of the Establishment Clause is "logically impossible; it would be like trying to apply the Tenth Amendment to the states"); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 253 n.19 (1988) ("[T]o the extent that the framers of the first amendment sought to protect state establishments against national action, it is not entirely coherent to say that the amendment is now applicable to the states.").

[8] *See also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 381 (2002) ("Modes of establishments in the colonies differed very widely, and the word 'establishment' was not used consistently.").

From the outset, the Founders recognized that the federal government lacked authority to interfere with these state establishments, and in particular lacked the authority to establish a national church. The federal government was to be a government of limited and enumerated powers. The Framers emphasized that "[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined." THE FEDERALIST NO. 45, at 292 (Clinton Rossiter ed. 1961) (James Madison).

This general principle extended to matters of religion. James Madison observed in the Virginia ratification debates that "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." 5 THE FOUNDERS' CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987). James Iredell similarly stated in defending the proposed Constitution that "[i]f any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Everyone would ask, 'Who authorized the government to pass such an act?'" 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 194 (Jonathan Elliot ed., 2d ed. 1881). Thus, even before the Establishment Clause was embodied in the text of the Constitution, there was a general recognition that the federal government lacked the power to interfere with the states' regulation of religion.

Despite these structural guarantees, there remained some concern that the federal government might usurp authority to act with respect to the establishment of religion. As James Madison observed in describing the proposed amendment, certain of the state conventions "seemed to entertain an opinion" that the Necessary and Proper Clause might enable Congress to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion." 1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789). In order to reinforce this jurisdictional division between the states and

the federal government and better secure religious liberty, when crafting the Bill of Rights the Framers sought to make this division of power express.

Congress went through several drafts in creating what ultimately became the Establishment Clause. James Madison initially proposed the following language: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 451. The House Committee of the Whole subsequently debated language that provided that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 757. Madison indicated that this provision meant that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 758. According to Madison, "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* At the same time, however, some "thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments." *Id.* at 757 (remarks of Roger Sherman).

Thus, the debates demonstrate that Congress believed that the federal government lacked authority to establish a national church or interfere with the state establishments. *See Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring in judgment). Nonetheless, in order to dispel any concerns, Congress sought to make this division of power express.

In doing so, the Framers made clear that the federal government would take no action that would restrict religious practices in any way. Accordingly, the Establishment Clause was coupled with a further admonition—that Congress was prohibited from passing any

law that would impermissibly burden the "free exercise" of religion. U.S. CONST. amend. I. The First Amendment therefore guaranteed religious liberty more broadly—beyond merely prohibiting the establishment of a national church that might interfere with established churches in the several states.

Early commentary on the Constitution confirmed this understanding of the amendment. Justice Story in his *Commentaries on the Constitution* stated that under the Establishment Clause "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833). The clause, according to Story, was merely designed to "prevent any national ecclesiastical establishment." *Id.* § 1871. Similarly, William Rawle, in his treatise on the Constitution, concluded that "[t]he first amendment prohibits congress from passing any law respecting an establishment of religion, or preventing the free exercise of it. It would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by congress." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 106 (Philip B. Kurland & Ralph Lerner eds., 1987).

Recent historical scholarship has further confirmed the jurisdictional nature of the amendment. Thus, the clauses have been described as an "exercise in federalism," as making "explicit jurisdictional policies that were already implicit in the constitutional order," and as preventing federal "interfer[ence] with any state's religious establishment laws."[9] Such analyses have shown that even

[9] *See, e.g.*, AMAR, *supra*, at 32 (Establishment Clause "prohibited the national legislature from interfering with, or trying to *dis*-establish,

churches established by state and local governments"); BRADLEY, *supra*, at 95 (Establishment Clause intended to make clear "that the national government may neither effect an establishment nor interfere with states that do"); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-18 (1995) ("The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism."); David O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1142 (1988) (noting the "federalistic motivation for the establishment clause"); Donald L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 650 (1999) (Establishment Clause "merely made explicit the jurisdictional policies that were already implicit in the constitutional order"); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 307 (1989) (Establishment Clause was designed "to protect state religious establishments from national displacement"); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2109 (2003) (Establishment Clause "prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states"); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) ("The original intention behind the establishment clause . . . seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion."); Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) ("[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment."); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003) (Establishment Clause "acts as a sort of 'federalism-based' guarantee that merely delineates the proper roles of the federal and state governments with respect to religious establishments"); William W. Van Alstyne, *What Is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 910-11 (1987) (under the Establishment Clause, "Congress would have no power to interfere with any state's religious establishment laws, whatever they might be").

Thomas Jefferson, whose references to "separation" of church and state form the basis for the Court's Establishment Clause jurisprudence, *see Everson*, 330 U.S. at 16, viewed the clause as a purely jurisdictional provision. *See* AMAR, *supra*, at 34 (observing that Jefferson "appears to have understood the states'-rights aspects of the original establishment clause"); DONALD L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 59-60 (2002) ("A careful review of Jefferson's actions throughout his public career suggests that he believed, as a matter of federalism, that the national government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises.").[10]

In his Second Inaugural Address, for example, Jefferson made clear that, while the federal government lacked authority to pass measures pertaining to "religious exercises," the states remained free to do so:

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general [i.e., federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.

[10] The relevance of Jefferson's views is also questionable given that he was not involved with drafting the First Amendment: "Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting). *See also* DREISBACH, *supra*, at 98-99 (Jefferson's "influence on the actual text of the First Amendment was at most indirect").

Second Inaugural Address (March 4, 1805), 3 THE WRITINGS OF THOMAS JEFFERSON 378 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905). Similarly, in a letter to Samuel Miller, Jefferson maintained that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the states, as far as it can be in any human authority." Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *in* 5 THE FOUNDERS' CONSTITUTION 98 (Philip B. Kurland & Ralph Lerner eds., 1987).

This is not to say that Congress has no authority in matters of religion. The First Amendment merely prohibits legislation respecting an "establishment" of religion. *See* U.S. CONST. amend. I. In fact, the Framers specifically rejected more sweeping language that would have prohibited Congress from passing any law "touching religion." *See* 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789).

In exercising its enumerated powers, Congress remained free to enact measures that had the incidental effect of aiding or promoting religion. Thus, for example, the same Congress that drafted the First Amendment took a variety of measures that aided or promoted religion, including enacting legislation providing for paid chaplains and proclaiming a day of thanksgiving and prayer. *Lynch*, 465 U.S. at 674, 675 n.2; *Wallace*, 472 U.S. at 100-01 (Rehnquist, J., dissenting) (citing 1 ANNALS OF CONG. 914 (1789)). Indeed, Justice Story concluded that "the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of

religious worship." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868 (1833).[11]

Nor does this mean that there are no constraints on state activity with respect to religion. Such activities would still be subject to the prohibitions found in the Free Exercise Clause as incorporated under the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).[12] To the extent a state engaged in activity that had the effect of impairing citizens' right to exercise their religious preferences, such actions would be constitutionally prohibited. *See Newdow*, 124 S. Ct. at 2332 (Thomas, J., concurring in judgment) (observing that "coercive state establishments" might be constitutionally prohibited); *Schempp*, 374 U.S. at 312 (Stewart, J., dissenting) ("That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized.").

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[11] *See also* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 160 (1964) ("A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval."); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 113 (1997) ("There was nothing either in the text of the provision . . . or in Madison's explanation of its meaning to suggest either that it forbade Congress to provide impartial support to religion in general or that it entitled those with religious scruples to exemptions from generally applicable laws."); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 909 (1986) ("[T]he establishment clause was debated on the assumption that the government may have some power to aid religion.").

[12] The Free Exercise Clause is properly subject to incorporation, unlike the Establishment Clause, because it acts not as a structural guarantee, but rather protects individual liberties. *See* AMAR, *supra*, at 254-56.

B. Recognition of the jurisdictional nature of the Establishment Clause would be consistent with this Court's jurisprudence enforcing other aspects of the federal structure.

Recognition of the jurisdictional nature of the Establishment Clause would be consistent with the Court's jurisprudence in other areas in which it has given renewed emphasis to the structural guarantees embodied in the Constitution. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

It is "incontestible that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). While the states "surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Id.* at 918-19 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)). This fundamental aspect of our constitutional system is "reflected throughout the Constitution's text." *Id.* at 919. In particular, residual state sovereignty is "implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Id. See also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").

Because the Constitution is "'an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.'" *New York*, 505 U.S. at 156 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)). Indeed, this has been "the Court's consistent understanding." *Id.*

This aspect of our constitutional structure represents a "'unique contribution of the Framers to political science and

political theory.'" *Printz*, 521 U.S. at 921 n.11 (quoting *Lopez*, 514 U.S. at 575). The "separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 921. "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *New York*, 505 U.S. at 181-82 (quoting *Ashcroft*, 501 U.S. at 458).

In implementing this division of authority, "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. Areas of fundamentally local concern such as marriage, *Trammel v. United States*, 445 U.S. 40, 50 (1980), domestic relations, *id.*, and criminal law, *Lopez*, 514 U.S. at 561 n.3, were reserved to the states.

Religion—and in particular decisionmaking by local governmental bodies concerning the public display of symbols that have religious meaning—is just such a uniquely local matter. Indeed, "it is common knowledge that the Constitution's framers thought that religion was a matter for the states, not for the national government . . . ." SMITH, *supra*, at 119. *See also* AMAR, *supra*, at 34 (observing that the Establishment Clause "calls for the issue [of establishment] to be decided locally"). Under our Constitution, "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions." *Ex parte Garland*, 71 U.S. 333, 397-98 (1867) (quoting STORY, *supra*, § 1878).

The same considerations that drove the Framers to reserve the power over matters of religion to the states apply today. There are dramatic cultural and religious differences both among and within the states. The Constitution's reservation of local control over matters touching upon

religion wisely allows for a diversity of practices instead of imposing a judicially-enforced, uniform rule.

These structural principles, if not dispositive, should at a minimum inform the Court's Establishment Clause jurisprudence. Due regard should be given to the states' traditional role in matters of religion, particularly where, as here, the issue before the Court implicates local control over state or municipal property. *Cf. New York*, 505 U.S. at 161 (federal government may not "commandeer" or direct local authorities).

III. Even under the *Lemon* test, the Establishment Clause does not prohibit displays that have both religious and historical significance.

Even under the *Lemon* test—flawed as it is—the display of the Ten Commandments does not violate the Establishment Clause. This Court has emphasized that where public displays have both religious and historical significance, they do not constitute an "establishment" of religion. All that is required is that a display not be "motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. That is the case here where the Ten Commandments have played an important role in the history of Western Civilization and the development of our legal system.

A. Displays of the Ten Commandments have both religious and historical significance.

The Court has consistently recognized that "religion has been closely identified with our history and government," *Schempp*, 374 U.S. at 212, that "[t]he history of man is inseparable from the history of religion," *Engel*, 370 U.S. at 434, and that "[i]nteraction between church and state is inevitable," *Agostini*, 521 U.S. at 233. There has been "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. At bottom,

"[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

In particular, the Court has upheld public practices that have both historical and religious significance. *See Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, for example, the Court eschewed rigid application of the three-part *Lemon* test and upheld the Nebraska legislature's practice of opening legislative sessions with a prayer on the ground that it was "deeply embedded in the history and tradition of this country." *Id.* at 786. In doing so, the Court noted the "unambiguous and unbroken history of more than 200 years" supporting such practices, which the Court concluded established "the practice of opening legislative sessions with prayer" as "part of the fabric of our society." *Id.* at 792.

So, too, the Ten Commandments are part of the "fabric of our society" in that they have played a significant historical role not only in the development of major religions and systems of secular morality, but also our legal system. *Cf. id.* at 783 (legislative prayer was a "tolerable acknowledgment of beliefs widely held among the people of this country"). As a direct result of their significant historical role in our society, the Commandments are posted on many public buildings, including this Court, the U.S. Capitol, various state capitols, and numerous federal courthouses. *See Aguillard*, 482 U.S. at 593-94 (observing that the Ten Commandments have not "played an exclusively religious role in the history of Western Civilization"); *City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting) ("Undeniably, . . . the Commandments have secular significance . . . because they have made a substantial contribution to our secular legal codes.").

Even in *Stone* where the Court strictly applied the three-part *Lemon* formula and held that a specific Ten Commandments display in a public school violated the

Establishment Clause, it further observed that such a display would have been appropriate if it had been "integrated into the school curriculum . . . in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citing *Schempp*, 374 U.S. at 225). The Court concluded that the particular Ten Commandments display before it was unconstitutional only because it "had no secular legislative purpose." *Id.* at 41. Here, the situation is much different, given that the displays were associated with the historical role the Ten Commandments played in the development of legal and moral principles that have had a significant impact on Western Civilization. *See ACLU of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438, 443 (6th Cir. 2003).

Indeed, since the Court issued its decision in *Stone* and its subsequent ruling in *Marsh*, it has repeatedly upheld displays of religious symbols that manifest both a religious and secular purpose. *See, e.g., Pinette*, 515 U.S. at 766 (upholding display of a cross); *Lynch*, 465 U.S. at 684 (upholding display of a crèche); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (upholding display of a menorah). To exclude the Ten Commandments—part of the foundation of our modern legal system—would be inconsistent with these prior rulings. Moreover, it would cleanse from the public square an important aspect of our nation's history.

B. The test under *Lemon* is an objective one.

The lower court's ruling to the contrary was the result of its misapplication of the *Lemon* test. The test under *Lemon* is an objective one. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 308 (test based on an "objective observer"); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (Court looks to "the 'objective' meaning of the [government's] statement in the community"). The constitutional analysis is based on the perceptions of a *reasonable* observer. *Lynch*, 465 U.S. at

691-94 (O'Connor, J., concurring). *See also County of Allegheny*, 492 U.S. at 592.

The reasonable observer "is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in judgment) (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)). Consequently, the Court does not "ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.'" *Id.* at 780 (emphasis in original) (internal quotations omitted).[13] Rather, the standard is based on the perceptions of an *objective* observer. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 308.

The lower court, in contrast, rested its decision on an extensive analysis of what it believed to be the subjective purposes of government officials. It pointed to their earlier attempts to erect "constitutionally invalid displays," concluding that these prior attempts "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint." *McCreary County*, 354 F.3d at 457 (internal quotations omitted). The lower court's reliance on this subjective analysis means, in effect, that *no* display of the Ten Commandments by these government actors would

[13] While courts may ascertain whether a state's articulation of a secular purpose is a "sham", the "Court is normally deferential to a State's articulation of a secular purpose." *Aguillard*, 482 U.S. at 586-87. Moreover, this aspect of the Court's jurisprudence should not be construed as an invitation to engage in a wide-ranging inquiry into the subjective beliefs of state actors. Such an invitation is inconsistent with this Court's precedents and would only lead to additional confusion.

be possible given that, according to the court, they had attempted to erect "unconstitutional" displays. Such a ruling is not supported by this Court's precedents. In determining whether the government intends to convey a message of endorsement or disapproval of religion, "a court has no license to psychoanalyze the legislators." *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring in the judgment). Rather, courts must apply an *objective* analysis based on the perceptions of a *reasonable* observer.

Indeed, one could view these attempts in just the opposite way: The government officials in this case went to great lengths to comply with the judicially-created requirements under the Establishment Clause. Their attempts to comply with these often vague requirements are now being used as a sword against them. Such a test is fundamentally unfair and should not be sanctioned as a constitutional requirement.

In fact, this Court has made clear that where government action was originally motivated by a solely religious purpose, which was subsequently supplemented by a secular purpose, there is no Establishment Clause violation. Thus, for example, the Court has upheld Sunday Laws that originally required the closure of businesses for wholly religious reasons. *See McGowan v. Maryland*, 366 U.S. 420 (1961). The Court concluded that, while the original purpose of such laws may have been to promote religious observance, they subsequently took on in addition a secular purpose—to provide a day of rest and ensure the health and tranquility of the community. *See Schempp*, 374 U.S. at 263-64 (Brennan, J., concurring).

At bottom, the subjective test implemented by the court below "not only misapplies the law, it also invites a new round of First Amendment challenges to religious texts and symbols that are nearly ubiquitous in non-schoolhouse public buildings throughout the nation, particularly courthouses." *ACLU of Kentucky v. McCreary County, Kentucky*, 361 F.3d

928, 933 (6th Cir. 2004) (Boggs, C.J., dissenting). When the constitutional test requires the courts to analyze the subjective, and often hidden, intentions of government actors it is sure to spur unwarranted and particularly divisive litigation. *See Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (observing that "Establishment Clause cases . . . stir deep feelings"). The courts and government actors require an objective test that provides them with clear guidance.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court uphold the states' legitimate authority to display the Ten Commandments and reverse the decision below.

Respectfully submitted,

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Dated: December 8, 2004

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

(18)

No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, *et al.*,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE FAITH AND ACTION, INSTITUTE IN BASIC LIFE PRINCIPLES, INTERNATIONAL REAPERS FOUNDATION, THE NATIONAL CLERGY COUNCIL, AND A COMMITTEE OF CONCERNED CITIZENS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE IN THIS CASE

Amici Faith and Action, Institute in Basic Life Principles, International Reapers Foundation, The National Clergy Council, and a Committee of Concerned Citizens, believe the Ten Commandments should be displayed in this case, and the upcoming Van Ordon case.[1]

This brief represents the voice of literally thousands of citizens disturbed by the moral breakdown occurring in our society. Placement of the Ten Commandments in public view in the schools, courthouses, or on public property will not in and of itself change the moral direction of this nation, but will evidence the voice of the Founding Fathers in the Declaration that this nation believes in God and His moral laws.

Amici contends the progressive withdrawal of God and his moral law from society through government action, particularly in our schools, has had an enormously detrimental effect on our culture, particularly our young people that represent the future of this nation.

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1. This brief has been authored in its entirety by undersigned counsel for the amici curiae. No person or entity, other than the named amici and their counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent have been submitted herewith.

INTRODUCTION

There is a grave sickness in this nation, the schism of society has begun, and there is severe social tension. The right to display the Ten Commandments is rooted in our Declaration of Independence, and is urgently needed as representing this nation's Faith in God and His moral law.

The Ten Commandments represent the ethics of Nathan of the Decalogue, who was not afraid to call David a murderer to his face, (II Sam. 12:1-15); Commandments that come not from man, but from God and denounce all kinds of greed, immorality, and social iniquity.

The admonition of our Declaration has been withheld from society and we sit now amidst the moral wreckage we are making of our nation. We sit in smug complacency for are we not the wealthiest and mightiest nation on this earth?

History discloses that the incurable sickness of the world is due, more than any economic cause, to the total corporate failure of man in the realm of righteousness. Man has not known God's moral law, or knowing it, has not obeyed. History both discloses and warns of the tragic consequences of disobeying God's moral law.

Our Founders believed, as is disclosed in the Declaration, that those objectives could be achieved only by the "protection of Divine Providence" and ". . . appealing to the Supreme Judge of the world for the rectitude of our intentions . . . we mutually pledge to each other our lives, our fortunes, and our sacred honor."

The Declaration does not contain, nor is intended to declare, how a personal relationship with God is established; that's up to each person's own religious convictions. Every person has the personal responsibility of determining his relationship with God and his eternal destiny. Many of the founders believed that "it was appointed onto man once to die, and after that the judgment." The only way eternal life could be attained was by confessing Jesus Christ as their Lord and Savior. Others believed differently. None of those religious convictions were written into the Declaration.

The Declaration of Independence, written in the blood and sacrifice of those who signed it,[2] was not a document to be debated in the court room, provided for no amendment, and appealed "to the Supreme Judge of the world for the rectitude [an old English word meaning moral uprightness] of our intentions." It was a statement of the Philosophy of Government of this nation as its governing "Rule of Law."

They were building a bridge for freedom across a deep chasm of conflict, based on God's moral law which was intended to secure those unalienable rights and freedom for themselves and the future of this nation.

It calls to mind a 19th century poem of an old traveler who toward evening, after having crossed a deep chasm, to the amazement of a fellow traveler standing near, started building a bridge.

"Old man," said a fellow Pilgrim standing near,
"You're wasting strength by building here;

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2. Of the 56 signers, five were captured as traitors and tortured before they died. Nine others fought and died during the Revolutionary war. Many lost their health, wealth, homes, and often their families.

Your journey will end with the ending day,
You never again must pass this way.
You've crossed the chasm deep and wide,
Why build you the bridge at the even tide?"
The builder lifted his old grey head,
"Good friend in the path I've come," he said,
"There followed after me today
A youth whose feet must pass this way.
That chasm which has been naught to me,
To that fair haired youth a pitfall may be.
He too must cross in the twilight dim.
Good friend, I'm building the bridge for him."

There is a marvelous, courageous, and exciting young generation coming down the trail behind us. Many are fighting and dying right now for our freedom. Will we leave them the same "Bridge" of freedom, moral stability, and faith in God which was left to us, or are we in the process of destroying that "bridge."

A COHERENT LAW IS REQUIRED TO DO EQUITY AND JUSTICE, OR, THE ESTABLISHMENT CLAUSE NEEDS NEW LIGHT

In the modern-day establishment clause jurisprudence, there exists a troubling undertone of dissatisfaction. Although the court struggles to do justice, it understands a problem exists and is searching for the answer.

Justice O'Connor fretted with that problem in *Wallace v. Jafree*, 472 U.S. 38 (1985) when she observed:

> It is necessary to frame a principle grounded in the history and language of the First Amendment,

> and that we must strive to do more than erect a constitutional signpost (internal citation) to be followed in any particular case in which our predilections may dictate. Instead our goal should be to frame a *principle for constitutional adjudication* that is not only grounded in the history and language of the First Amendment but one that is also *capable of consistent application* to the relevant problems. (Emphasis supplied)

Justice Kennedy likewise reflected at his discontent in *Allegheny v. ACLU*, 492 US 573 (1989):

> Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement affect simply by reason of their lack of historical antecedent. (FN 10)Neither result is acceptable.

DEVELOPMENT OF THE MODERN-DAY LITIGIOUS ESTABLISHMENT CLAUSE

Once upon a time, this nation basked in the sunshine of a judicial system free of establishment clause litigation. After nearly 170 years of this balmy judicial weather, a dark cloud appeared on the horizon, *Everson v. Board of Education*, 330 U.S. 1 (1947). Nothing like this cloud had been seen before and not having any previous precedent to protect against its "obvious danger," documents of origin did not seem to provide a clear remedy for the problem, luckily they found a

letter[3] from Mr. Jefferson after considerable searching, with which they were able to "clarify" the original documents by writing into them a "wall of separation between church and state." The impenetrable "wall" was now ready to be used, although fortunately it did not seem to be necessary in the instant case. They of course could have no realization of the constant repair problems that were going to be encountered with reference to the "wall."

In dealing with this problem, the court evidently took no notice that during the previous 170 years, no one could find any history of a "cloud" like *Everson.* To the contrary, society seemed to be operating without any need for such a "wall." Public declaration of God and the Bible existed without restraint.

In 1782, Congress approved the printing of the Bible, the McGuffey reader filled with God and the Scripture inundated our school classrooms to the extent that President Lincoln proclaimed it was the "schoolmaster of the nation." There were sincere prayers by various Presidents, not simply ceremonial rhetoric; prayer and Bible study in the schools and colleges; proclamations by the government for fasting and prayers; "In God We Trust" on our coins, chaplains in the service; chaplains in the House and Senate without objection, etc.

This court's opinions and briefs are filled with recognition that prior to *Everson* this nation had the privilege of acknowledging God, prayer, and the Bible in our public

3. As Justice Rehnquist has subsequently observed, Jefferson was in France at the time the amendment was debated and adopted, and the letter written 14 years after the fact , has been distorted to accomplish the "result oriented" decision.

life without restriction. There was not a scintilla of evidence that society suffered any adverse affects.

Then suddenly, following on the heels of the *Everson* "storm threat," came *McCollum v. Board of Education*, 333 U.S. 203 (1947), in which, probably recognizing that the previous 170 years without problems must be a myth and apparently recognizing that something had gone awry in those years, determined that this country was in definite need of protection against publicly proclaiming God, particularly in the schools. Fearing disastrous consequences, a divided court struck down school prayer stating, "*. . . [T]oday it is the story of changing conceptions regarding the American democratic society.*" (*Emphasis added*).

Justice Jackson observed, however, that "We should place some bounds on the demands for interference with local schools. . . . in view of the number of litigations likely to be started as a result of this decision." (*Id.* at 232)[4] and as a result ". . . we are likely to make the legal 'wall of separation between church and state' as winding as the famous serpentine wall designed by Mr. Jefferson for the university he founded." (*Id.* 238) As a result, the infamous litigious "wall" years have been launched, with cases growing , as the dissent in McCreary below commented, in "imagination" and volume.

In the cases that followed, a clear lack of coherency developed. With rare exception, all the cases were split decisions; there was no unity on the bench.

4. As history has subsequently recorded, those were gross understatements.

Lemon v. Kurtzman, 403 U.S. 602 (1971) sought to provide a support in the "Lemon test" to the prophesied "meandering wall." The cases are littered with judicial explicitives concerning the incompetence of the employed Lemon guide, and where to find the location of the "wall." Disparate results frequently occurred, for example, *Allegheny v. ACLU*, 492 U.S. 573 (1989) where one Christmas display was found acceptable and the other unacceptable.

The cases over the years likewise developed certain confusing and subjective terminology: "[the] secular purpose" cannot be a "sham." *Santa Fe Independent school District v. Doe*, 530 U.S. 290, 308 (2000). *McCreary* below: "finding of irreparable injury is mandated." citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) "peer pressure," *Abington v. Schempp*, 374 U.S. 203 (1963); "outsiders while the others are insiders," *Lynch v. Donnelly*, 465 U.S. 668 (1984); prayer compared to religious persecution in England and the incarceration of John Bunyan; *Engle v. Vitale*, 370 U.S. 421 (1962); "No person can be punished for entertaining or professing religious beliefs or for disbelief nor for church attendance or nonattendance"

The cases are filled with subjective descriptions: "direct or indirect coercion," "peer pressure," "outsider or insider," Even the far-reaching application of results in England of religious persecution using the illustration of when John Bunyan was put in jail for refusing to comply with certain religious requirements of the Church of England, and refusing to stop certain religious practices. Disagreement surfaced, even among its adherents, that the modern establishment clause doctrine was cumbersome and difficult to apply in these "troublesome areas."

In these "wall of separation" cases the dissents smolder with historical facts adverse to the majority holding and their interpretation of the establishment clause. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice Burger complains that the modern interpretation is inconsistent with the obvious definition recognized by Congress in 1789 when at the same time the Bill of Rights was sent to the state legislators for approval, Congress was providing for a chaplain in the House and Senate, a practice that has continued for over 200 years. In *Wallace v. Jafree*, 472 U.S. 382 (1985), Justice Rehnquist finds that the First Amendment had a *well accepted meaning* that *Congress would not establish a national religion* and that "neutrality" will not work.

So the case law is in shambles as far as a coherent establishment of an evidentiary foundation is concerned, and into that confusion is being poured the proliferation of cases exploited by the ACLU and its like who have no legitimate interest except to them its big business.[5]

THE DECLARATION IS PART OF OUR CONSTITUTION

"Why should not the Declaration control the outcome of establishment clause cases under the First Amendment?" Perhaps the reason is it would require rewriting the establishment clause.

The original States endorsed the Declaration and every State since has been required to provide a government that is ". . . republican in form and in conformity with the Constitution of the United States and the *principles of the Declaration of Independence* . . ." [*See* State of Hawaii, Pub. L. No. 86-3, 73 Stat. 4 (1959)] (Emphasis supplied)

5. See their extensive and expensive web site.

To become a territory of the United States, its government must comply with the Northwest Ordinance—adopted July 13, 1787 by the United States in Congress assembled—Article Third, providing "religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." [6] [7]

Justice Douglas in *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1218 (1961), captured that historical fact in these words:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator which government must respect. The Declaration stated the now familiar theme: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' *And the body of the Constitution as well as the Bill of Rights enshrined those principles*. (Emphasis added)

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6. It is specifically to be noted that this was adopted the same week that Congress was completing the draft of the First Amendment. The ordinance was reenacted in 1789 at the time the Bill of Rights was sent to the states for approval.

7. *See Meyer v. United States*, 272 US 52, 174-75 (1926).

Former President John Quincy Adams at the Jubilee of the Constitution on April 30, 1839[8], the 50th anniversary of the inauguration of President Washington stated: [9]

> This act [the Constitution] was the compliment to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and formulating with it, one entire system of government . . . the Declaration and Constitution are parts of one consistent whole, founded upon one and the same theory of government, then new, not as a theory, for it had been working itself into the mind of man for many ages, and been especially expounded in the writings of Locke, but had never been adopted by a great nation in practice.

November 19, 1863 , President Lincoln in his Gettysburg Address officially recognized the Declaration of Independence as the beginning of this nation. Its Philosophy of Government was the reason for the bloody civil war because the government of the United States, which had been formed to protect the rights declared in the Declaration, was standing by that obligation even to the point it was committing its citizens to battle and death.

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8. This address of course was some 50 years or so after the adoption of the Bill of Rights.

9. *America's Rule of Law* by Robert C. Cannada; published, National Lawyers Association Foundation (2001).

THE MEANING AND FUNCTION OF THE DECLARATION

The Declaration establishes our Philosophy of Government, or Rule of Law, and is made up of words selected for their precise meaning.

The "laws of nature and of nature's God" state "truths" which are "self-evident" that all men are "created equal," and "endowed " by their Creator with certain "unalienable rights."

The third sentence in the second paragraph is of utmost importance because it emphasizes that the principles set forth in the Declaration are to be protected and implemented by the government instituted. The sentence provides:

> That whenever any *form of government becomes destructive of these ends*, it is the right of the people to alter or to abolish it and *institute* new government, *laying its foundation on such principles* and organizing its powers in such form as to them shall see most likely to affect their safety and happiness. (Emphasis added).

Breaking that sentence down into its component parts, we find that the Declaration states "One people" may establish a "new government " but must first proclaim a "foundation of principles" on which that government is to be organized; the Constitution provides for the protection of those foundational principles.

Our Declaration is actually the Preamble to the Preamble of the Constitution.[10] The Constitution is subordinate to the foundational principles in the Declaration.

The founder's formula is thus simple: Foundational principles are first established and then the Constitution of the government is for the protection of those principles and cannot be repugnant to the Declaration as the initial document of origin.

The founding fathers expressed in the Declaration in very strong and forceful language their concept of the legal relationship between the Declaration and the government to be formed. So strong was that feeling that of the 55 delegates to the "Constitutional convention," only 39 initially signed the Constitution.

It is thus imminently clear from the Declaration that the Constitution, including the First Amendment, cannot violate the Rule of Law contained in the Declaration by prohibiting the public expression of that philosophy.

The last sentence of the Declaration thus unequivocally invites public governmental expression of God and his moral law. In graphic support of that conclusion, it invokes the protection of Divine Providence, the Supreme Judge of the world. At the oral argument on the Pledge of Allegiance case involving the provision "under God," Justice Stevens asked an interesting question. "Do the words 'under God' have the same meaning today that they did then." I did not think he

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10. The prominent constitutional scholar William Bentley Ball, shortly before his death in 1999, expressed the legal connection between the Declaration in the Constitution in that manner.

got a clear answer from either counsel, but the meaning that this nation recognizes a living God, as opposed to atheistic communism, is the same today as it was in 1954. Likewise the Declaration has the same meaning today as in 1776.

The precise meaning of the terms used had well-known meanings and resulted in a unified decision in spite of heated debates. The words clearly conveyed the reality of God as our Creator, their faith in Him and his moral laws as our foundation for government.

From Blackstone's *Commentaries on the Laws*:[11]

> Law, in its most general and comprehensive sense, signifies a rule of action; . . . Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the *laws of nature and of nations*. And it is that rule of action which is prescribed by some superior, in which the inferior is bound to obey. Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. This will of his maker is called the *Law of Nature*. . . . This Law of Nature, been coeval with mankind and dictated by God Himself, is its core superior in obligation to any other . . . these are the eternal, immutable laws of good and evil . . . the doctrines thus delivered we called the revealed

11. Introduced in 1766 was invoked as an authority in the writings of James Kent, James Wilson, Fisher Amos, Joseph Story, John Adams, Henry Lawrence, Thomas Jefferson, James Madison, James Otis, etc.

> or divine law, and are to be found only in the Holy Scriptures . . .

From Locke:[12]

> The Law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must . . . be conformable to the *Law of Nature*, i.e. to the will of God.

Richard Hooker: The *Law of Nature* comes from the Scripture which is filled with the *Laws of Nature*.[13]

As the brilliant constitutional scholar William Bentley Ball expressed shortly before his death in 1999; "The Declaration is the Preamble to the Preamble of the Constitution." These two documents, the Declaration and the Constitution are really one document, our "Documents of Origin."

An exegesis of the Declaration reveals that the existence of "Nature's God," the "Creator," "Laws of Nature and of Nature's God," represent God's "Moral Laws" for humans which cannot be ignored by the government. These laws were universally and historically recognized as coming from the Bible which includes the Ten Commandments.

12. *Two Treaties*, Book II, p. 285, Chapter XI, § 135

13. *The Works of That Learned and Judicious Divine*, Mr. Richard Hooker, Vol. I pp. 148,207,230,427

The Bible is the most accurate piece of ancient literature that exists, and it was quoted by the founders more frequently than any other source.[14]

President Truman, when questioned concerning the reason for America's greatness following the World Wars, said:

> The fundamental basis of this nation's laws was given to Moses on the Mount. The fundamental basis of our Bill of Rights comes from the teachings we get from Exodus and St. Matthew, from Isaiah and St. Paul. I don't think we emphasize that enough these days. If we don't have a proper fundamental moral background, *we will finally end up with a totalitarian government which does not believe in rights for anybody except the State!* (Emphasis supplied).[15]

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14. For prodigious research material, see *Evidence That Demands a Verdict* by Josh McDowell, 1972, pgs. 17-79.

> . . . [H]istorians are discovering that the Bible, perhaps even more than the Constitution, as our founding document.

Woodward and Gates, *How the Bible Made America*, Newsweek, 12.27.82, p.42 (see also *Original Intent*, Barton, WallBuilders, 2000 p.226)

15. http//www.zdraines.homestead.com/files/bookusa.htm (One Nation under God; part eight-*America at the Crossroads*, summary).

ATTEMPTED NEUTRALITY ON GOD RESULTS IN A RELIGION OF SECULAR HUMANISM

Consequences causing "irreparable harm" to those alleged to have been offended by God are described in terms such as "outsider or insider," "unaccepted," "embarrassed," and words of similar import. As for the activity assaulted, the defense has to show it wasn't "sham," "that the victim wasn't coerced or required to do something against their religious convictions," etc. *Engle v. Vitale*, 370 U.S. 421 (1962) even uses the veiled comparison of John Bunyan being put in jail for noncompliance and engaging in restricted religious activities.

The above represent the "evidence" of "irreparable harm" for being exposed to God or anything that represents Him without any evidence of actual financial loss or punishment being produced. As will be briefly described, the same cannot be said for those who are confronted with the requirement to bend the knee to Secular Humanism.

In *Torcaso v. Watkins*, 367 U.S. 488 (October 1961), the court found Secular Humanism to be a religion which does not teach the existence of the God of creation, and that man is his own god, and capable of creating his own moral laws.

The rulings of the Supreme Court have resulted in removing the recognition of God or any reference to him from our schools. Rather than preventing the "establishment of a religion," the modern establishment clause doctrine has actually created a religion of secular humanism. Every person in this country in a public place must now "bow the knee," particularly in school.

The court ignores the fact that those who are not permitted to pray or acknowledge God in his school, or in a public building, have the feeling of being an outsider and banished from society as the "religious right", or as some fanatic because they believe in God.

The court actually requires compliance by the individuals, particularly in schools, or else that individual could be punished, or possibly put in jail. A young father in Dixon, Illinois was handcuffed and dragged off to jail in addition to being humiliated, simply for praying on the public sidewalk before his son went into the school.[16]

Chief Justice Roy Moore refused to bow the knee to secular humanism. He stood on his convictions and his rights under the Alabama statutes. He was fired from his job as the elected Chief Justice of the Supreme Court and was threatened with being disbarred.

The consequences for failing to bow the knee to secular humanism are not simply subjective "feelings" but often involve harsh consequences, including going to jail. The ACLU is like the Gestapo haunting your trail.

Cases that reach this court on the deprivation of rights to express their religious beliefs under the free exercise clause of the First Amendment are infinitesimal compared to what is going on in the lower federal courts, state courts, governmental places, and particularly in the schools of our nation.[17]

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16. I ended up representing him. I got the State's Attorney to dismiss the case. The father did not have money to pay.

17. See for example cases listed on page 22 of our Amici brief filed *Elk Grove v. Newdow,* on *cert.* No. 02-1624.

In one such case, a student wrote a paper on the life of Jesus Christ. She was given a zero by the teacher, even though other students were permitted to write about reincarnation, witchcraft, and the occult. *Seattle v. Dixon County School Board*, 53 F.3d 152 (6th Cir. 1995), *cert. denied*, 64 L.W. 3478 (1995). How must she have felt, plus being punished for failure to submit to the religion of secular humanism?

Edwards v. Aguillard, 482 U.S. 578, 579 (1987) without reference to the Declaration and in specific violation of its Rule of Law authorized the teaching of Darwin's philosophy of evolution, but denied the right to teach God as the Creator. Over the vigorous dissent of Justices Rehnquist and Scalia, the court found, "The act impermissibly endorses religion by advancing the religious belief that a supernatural being created humankind." Students were required to be taught a godless religion of humanism against their religious convictions or be punished.

Darwin's *On the Origin of Species (1859)* opines we are not created but evolve.[18] The bedfellow of this philosophy was Karl Marx who said "In our evolutionary concept of the universe, there is absolutely no room for either a Creator or a ruler."[19] Without a Creator, there are no unalienable rights, only man made rights. It is thus permitted to teach a godless philosophy in our schools that does not value life at the beginning or at the end, while denying the principles contained in our Declaration of Independence.

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18. Macroevolution is the theory that holds that all varieties of life forms emanated from a single cell or "common ancestor," and that man mutated through random molecular biological changes and man as a mammal came through the ape family, the picture you most customarily see in a school book.

19. Marx and Engles On religion, ED. Reinhold Neubauer (New York: Schocken is, 1964), 295.

Justice Mannion observed in his dissent in *Books v. City of Elkhart* 235 F.3d 292 (2000) in which the court ordered the removal of Ten Commandments from the lawn of the city's Municipal Building:

> The Ten Commandments monument also serves as an historical headstone, not only for our nation's original foundation, but also for the 1950s, the religious time in America when as a nation we turned to God. The time when divorce, illegitimacy, drug abuse, murder, abortion, youth violence, and the other crises of today were still relatively rare.

Based upon the index of leading cultural indicators, 2001, for the period between 1960 and 1999 out of wedlock births are up 523%; out of wedlock teen births increased 430%; teenage suicides increased over 100%; the records are replete with drug use, pregnancies in grade school, pornographic literature, nudity on public television, an epidemic of AIDS and other sexually transmitted disease. Since 1960 we have developed a major moral problem in this nation particularly that is attacking our young people.

THE STRATEGY OF THE DEVELOPMENT OF AN ANTAGONISM TO THE DECLARATION OF INDEPENDENCE

There is a strategy to accomplish the goal of secular humanism, and remove God from a society and permit unbridled liberty and absolute individual autonomy. To accomplish this they must do away with the principles as established in the Declaration, which include the display of the Ten Commandments. If accomplished, man is free to create his own rights, and the citizen is subject to the tyranny of government.

The schools are the target to undermine convictions with claims of "greater knowledge, newer truths, and superior insight" so as to divide the past from the future. Under the steady "scholarly" attack, it was conjectured they could change the structure for belief in God so that He was no longer a plausible entity. This campaign has been carried out under the guise of political or religious freedom. The actual intent, however, is to vanquish anything that pertained to moral restraint.

An illustration of the kinds of totalitarian consequences that can result was the trial at Nuremberg. In his opening statement Associate Justice Robert Jackson, chief prosecutor for the United States, said: [20]

> The wrongs which we seek to condemn and have punished have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. . . . what makes this inquest significant is that these prisoners represent sinister influences that will work in the world long after their bodies have returned to dust. . . . they took from the German people all those dignities and freedoms *that we hold as our natural and unalienable rights in every human being*. . . . The Nazis directed such a campaign of arrogance, brutality, and annilation as the world has not witnessed since the pre-Christian ages. . . . Civilization can afford no compromise with the social forces which would gain renewed strength if

20. All of the recitations concerning the Nuremberg trial, Justice Jackson's opening and closing statement and excerpts from the evidence are taken verbatim from the Nuremberg trial record unless paraphrased from the record and that will be noted.

we deal generously or indecisively with the men in whom those forces now precariously survive.

(Emphasis added).

Justice Jackson presents parts of the evidence:

- ". . . . Religious persecution was cloaked in the language of religious liberty. . . ."
- "The Nazi party always was predominantly anti-Christian in its ideology. . . ."
- "The conspirators devised and carried out a systematic and relentless repression of all Christian sects and churches."
- ". . . . Educational institutions were suppressed or subjected to requirements of Nazi teaching inconsistent with the Christian faith."
- "Religious instruction was impeded and the exercise of religion made difficult."
- "Since the law was what the Nazis said it was, every form of opposition was routed out and every dissenting voice throttled."
- "International law, *natural law*, ... any law is always simply a propaganda device to be invoked when it would help and to be ignored when it would condemn what they wanted to do." (Emphasis supplied)

- "It was Rosenberg, the intellectual high priest of the 'master race,' who provided the doctrine of hatred which gave the impetus for the annihilation of Jewry, and put his infidel theories into practice. . . ."

Some transcribed testimony, and evidence from written documents read by Justice Jackson in his argument:

- "More and more of the people must be separated from the churches and their 'organs', the pastors. . . . never again must their influence on leadership of the people be yielded to the churches. This influence must be broken completely and finally."
- "The possibility of church influence must be totally removed. Not until this has happened, does the state leadership have influence on the individual citizens."
- ". . . . That conduct which is a crime in the moral sense must be regarded as innocent in law."
- ". . . . Christian teachings have stood in the way of a 'racial solution of the Jewish question in Europe.'"
- A Nazi document introduced into evidence asserted, "Of course, any such program must reckon with the opposition of the Christian Church. This was recognized from the beginning. [It was stated by the Nazi leaders] that 'national socialism and Christian concepts are irreconcilable', and the people must be separated from the churches and the influence of the churches totally removed."

- "We have to proceed brutally, the stronger is always right."

- "I think you can score many more successes when you want to lead someone if you don't tell them the truth than if you do tell them the truth."

The charge was "crimes against humanity." The Nazi counsel argued they were simply obeying the laws of their government, and any subsequent law was expo-facto. The response of Jackson was that there is a higher moral law of a Supreme Being which transcends human law with respect to personal moral accountability.

CONCLUSION AND SUGGESTED SOLUTION

With adequate citation of authority: (1) Declare the Declaration to contain this nation's philosophy of government; that it is part of our documents of origin and is consequently enshrined in our Constitution; (2) Redefine the "establishment clause" that it is subordinate to the provisions of the Declaration of Independence; (3) That under such redefinition, a display of the Ten Commandments is permitted and such other activities as are consistent with the philosophy of government contained in the Declaration of Independence; (4) Establish clear rules of evidence to be followed in the trial court which would determine on motion by the trial judge whether the plaintiff had standing to bring the action, taking into consideration who was financing the litigation, whether there was actual injury taking place, and permit depositions for that purpose; (5) That appropriate expression of the Philosophy of Government contained in the Declaration of Independence cannot be restrained otherwise it constitutes a violation of the "free exercise clause" of the First

Amendment. As such it is entitled to public expression; (6) Provide a clear definition of religion as opposed to a belief in God or his moral laws and predicate evidentiary instructions on that basis; (7) Establish instructions on who was responsible to carry the burden of proof, when that burden shifts, and the level of proof required whether it be by preponderance of the evidence, or beyond a reasonable doubt.

In accord with this new reevaluation of the establishment clause, the court below should be reversed. Ten Commandments should be displayed in both this case and the Van Ordon case.

Respectfully submitted,

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No. 03-1693

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS, as Pulaski County Judge Executive,

Petitioners,

v.

ACLU OF KENTUCKY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL, INC. AND FOCUS ON THE FAMILY IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Family Research Council, Inc. [hereinafter "FRC"] is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice. FRC has participated in numerous amicus curiae briefs in the United States Supreme Court, lower federal courts, and state courts.

FRC represents thousands of constituents in its efforts to protect the institutions of marriage and family in federal and state law. Toward that end, FRC has worked to strengthen the legal definition of marriage as being a union of one man and one woman, as it always has been in the United States. FRC has conducted extensive research and produced numerous publications regarding the traditions of legal, cultural, moral, and religious support for marriage, as well as regarding the tangible benefits of traditional marriage for individuals and society.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Focus on the Family [hereinafter "FOF"] is a non-profit communications and educational organization dedicated to the preservation of marriage, parenting, and the nurturing home. FOF produced a number of national and international radio broadcasts on family and cultural issues, publishes a number of magazines for family members of various ages and stages and a wider range of books as well as a website: family.org.

Millions of families in America and abroad rely on FOF for help in understanding the dynamics of their own family as well as what is happening with the family culturally and how they help strengthen both.

SUMMARY OF ARGUMENT

The Sixth Circuit's analysis of both the displays and the pertinent law was grievously mistaken. Contrary to what that court held, many Supreme Court precedents confirm what historians of America have long maintained: our constitutional and legal traditions cannot be accurately understood without recognizing their roots in a theistic worldview. But not just any theistic tradition; as this Court has said repeatedly, our beliefs in human rights and limited government, along with other fundamental convictions, have deep roots in the ethical monotheism of the Bible. The Ten Commandments are the central expression of this worldview.

The document displays challenged below recognize what this Court's cases have long taught. The displays fairly and impartially indicate that biblical ethical monotheism underlies American constitutional and legal traditions. The displays studiously avoid advancing, endorsing,

or otherwise vouching for the Bible as truly being the Word of God, or the religions based upon it. The displays therefore comport with all this Court's relevant precedents, as they were articulated most perspicaciously by Justice Powell in the case of *Edwards v. Aguillard*, 482 U.S. 578, 606-07 (1987) (Powell, J., concurring).

ARGUMENT

I. The Sixth Circuit Misunderstood the Message of the Documents on Display, Which Is That Biblical Ethical Monotheism Undergirds Our Basic Rights and Form of Government.

Applying what it believed to be the *Lemon* test, the Sixth Circuit held that the Kentucky displays had two constitutional defects: a "predominantly" religious purpose and the effect of "endorsing" religion. Both defects depended upon the court's conclusion that the Decalogue's "connection" to the other documents was not "demonstrated." Thus, the Sixth Circuit found no "secular" purpose because the Ten Commandments "lack[ed] a demonstrated analytical or historical connection with the other documents."[2] But the court did find an "endorsement" of religion because of "the complete lack of any analytical connection" between the Decalogue and the other displayed texts.[3] A "reasonable observer cannot connect them," concluded the Sixth Circuit.[4]

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[2] ACLU of Kentucky v. McCreary County, 354 F.3d 438, 451 (6th Cir. 2003).

[3] *Id.* at 460.

[4] *Id.*

The requisite "connection" is there. Unfortunately, the Sixth Circuit looked in the wrong place for the wrong sort of "connection." Unsurprisingly, it was disappointed. But a reasonable observer has no trouble seeing what the array of documents is about, and how the Ten Commandments fit right in.

A reasonable observer could be any member of this Court on a working day. The frieze in the Supreme Court chamber depicts eighteen individuals presented to the viewer as constituents of a class, as a multi-member unit or set. These figures – Hammurabi, Confucius, Justinian, Moses, Muhammad, and the rest – are a diverse lot, hailing from vastly different cultures and historical eras, possessed of different worldviews. What are they doing together in the frieze? What is the set-defining characteristic? They are all male, deceased, influential. But the reasonable viewer does not conclude that the frieze is simply about powerful dead men. At least three of the figures – Moses, Confucius, and Muhammad – are great religious figures. Most, however, are not. So the reasonable viewer does not take the set's defining characteristic to be religion. A reasonable observer who knows a little history sees before long that the frieze depicts a set of great human *Lawgivers*.

Consider now a reasonable observer of the Kentucky displays. Our observer sees eleven equal size frames containing a total of nine documents. All nine are presented in the same manner. None is held out to the eye as primary, special, separate. Any reasonable observer would conclude – as does anyone who views the Supreme Court frieze – that the individual specimens are members of a set.

What is *this* set's principle of unity? Many were produced by recognized political authority. But the Star Spangled Banner was not. Neither was the Decalogue. The Mayflower Compact and the Declaration of Independence were not, either: they are manifestos by people on the cusp of political organization. Some of the "political" documents are scarcely more than prayers – the Kentucky Constitution Preamble and the National Motto are two examples. Two (the Decalogue and the Magna Carta) are foreign imports. The Mayflower Compact has a foot on two shores, composed by English settlers anchored off the Massachusetts coast.

What do the individual members of *this* set have in common? Neither Lady Justice nor the Bill of Rights includes an explicit reference to God. All the others do, and the First Amendment refers to "religion." Both Lady Justice and the Bill of Rights make sense, moreover, in light of background convictions about equal human dignity, unconditional human rights, and limited government instituted *for* the people. These convictions suggest, if they do not imply, an objective moral order: rights do not depend upon power or prestige or upon some majority's (or powerful minority's) shifting view of what is advantageous to them. Human dignity and human rights have sources beyond the willing and wishes of people.

The God spoken of by the Kentucky documents is transcendent and intelligent, a greater-than-human source of meaning and value. The documents as a whole show that their human authors considered themselves dependent upon this God's continuing care. This care for humans according to a divine plan is most often called Providence, and the documents reflect heartfelt recognition of it. "In God We Trust." Many of the texts – the

Preamble, the Mayflower Compact, the first part of the Decalogue – make clear that humans owe God thanks, prayer, and homage.

A reasonable observer sees that the Kentucky displays contain a great deal of divergent detail, including much that is time- and place-bound, including complaints about particular temporal rulers, contingent political plans and the like. The reasonable observer's eye sees as well much that is grander, more exalted, even timeless. This observer's eye fixes upon the pervading common themes: God, and God's direction of and care for human persons. The documents are also pervaded by law, *nomos*, what is right to do, small and large: What is the morally sound way for government to treat people? How do people joined together in political community properly treat each other? What does justice require? How do we show respect for all humankind? What has God said to help us answer these important questions?

The reasonable observer sees that a unifying theme of the Kentucky display is the objective moral law as the effect or deliverance of God – ethical monotheism. The reasonable observer sees, too, that the documents evince a particular ethical monotheism, and its specific influence upon a particular nation: the United States of America. The reasonable observer concludes that the documents' unifying theme is that biblical ethical monotheism has shaped our basic law and our political tradition.[5]

[5] The Decalogue has a limited priority here, because it is the Bible's most concrete expression of ethical monotheism. It is nonetheless *illustrative* of that whole cultural and political worldview – biblical ethical monotheism – which shaped our tradition. To their credit, Defendants did not seek to highlight, or even to depict, this limited

(Continued on following page)

The Kentucky displays are really one frame of the Supreme Court frieze, brought into very sharp focus. They depict how *one* of the history's great Lawgivers – Moses – shaped *our* country, its laws and political institutions. And just in case, viewers of the courthouse displays read that it is about "Foundations of American Law and Government."[6]

This Court's testimony in favor of this theme is not limited to its own interior artwork. This Court more than fifty years ago stamped Madison's *Memorial and Remonstrance* as the Magna Carta of religious liberty in America. Appended in its entirety to *Everson v. Board of Education*,[7] and excerpted many times since by members of this Court, Madison's ode to freedom declares: "It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his (blessing . . .)."[8]

This is the message of the Kentucky documents: the American people, a religious nation, acknowledge that their actions as a people are guided by the Supreme Lawgiver, and they – that is, *we* – give thanks.

priority, so as to avoid all the more certainly the possible appearance of taking sides in strictly religious matters.

[6] *Id.* at 451.

[7] 330 U.S. 1, 63-72 (1947) (appx. to Rutledge, J., dissenting).

[8] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 213 (1963).

II. This Court's Precedents Sanction Governmental Displays Which Recognize the Dependence of Our Legal Institutions Upon Biblical Ethical Monotheism.

Many times since *Everson* was decided in 1947 has this Court affirmed Madison's central point. Just five years later, in *Zorach v. Clauson*, this Court gave unqualified approval to the proposition that "[w]e are a religious people whose institutions presupposes a Supreme Being."[9] This Court in *Schempp* later affirmed and elaborated upon this recognition, saying that the "fact that the Founding Fathers believed devotedly that there was a God and the unalienable rights of man were rooted in Him is *clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.*"[10]

The Sixth Circuit mentioned this passage from *Schempp*, but then wholly ignored its meaning. The lower court was convinced that, because documents such as the Bill of Rights and the Declaration of Independence do not include explicit mention of the Decalogue, no connection is "facially apparent." The court then required that the (assertedly) missing "connection" be supplied by full prefatory explanation. *McCreary County*, 354 F.3d at 451. *Schempp* belies the Sixth Circuit's conviction: neither the Mayflower Compact nor the Constitution expressly *says* that human rights are inalienable, or that they depend on God. The *Schempp* Court nonetheless said that "their" – that is, the Founders' – writings "evidence" those convictions. The question which *Schempp* poses about this case

[9] 343 U.S. 306, 313 (1952).

[10] 374 U.S. at 213 (emphasis added).

is whether the Declaration of Independence "evidence[s]" beliefs about the divine ground of inalienable rights, not what the Declaration expressly recites.

Schempp referred to two of the documents on display in Kentucky – the Mayflower Compact and that part of the Constitution known as the Bill of Rights. But this was no exhaustive list. This Court listed those two documents instead as members of a huge set of writings: those "from the Mayflower Compact" – written in 1620 – "to the Constitution itself" – written from 1789 to 1791. In between those temporal poles lies the Declaration of Independence. In it our founders declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

The Sixth Circuit found no evidence of biblical ethical monotheism in this great manifesto of our freedom, notwithstanding the several references to God, God's Creation, God's law, and our inalienable rights. The court below conceded only a "facial similarity" between the Decalogue and Declaration: "they both recognize the existence of a deity." *Id.* But this concession is facially mistaken: the "deity" of the Declaration is no anonymous or generic Supreme Being way out there, bereft of Providential care for humans (as is the god of deism). The "deity" of the Declaration is precisely that biblical God of which the *Schempp* Court wrote. It is the "creator" God who "endowed" (that is, who supplied gratuitously) creatures "equal" in dignity with "unalienable rights," including "life, Liberty, and the pursuit of Happiness."

The Sixth Circuit said that the Decalogue "say[s] nothing about men being created equal." *Id.* The Ten Commandments do not, it is true, contain the literal expression, "all men are created equal." But here again the lower court failed to take seriously this Court's admonition in *Shempp*: look for the convictions about God and human rights which the Founders' writings – the Declaration of Independence in this case – *evidence.* In fact, no ground of human equality has been more central to its achievement in this country that the belief we find in the Bible that we are all brothers and sisters of the same God. A glance at nineteenth century abolitionist arguments, or at the writings of Martin Luther King, Jr., makes that clear to any reasonable observer.

The Ten Commandments supply additional evidence of human equality, and supply the ground for inalienable human rights, too. The moral duties of the Second Table of the Decalogue are objective; that is, they are categorical and universal. It is simply wrong for anyone to murder, steal, bear false witness. These duties logically entail a class of beneficiaries who are thereby vouchsafed unconditional ("inalienable") human rights. Everyone has a right not to be murdered, not to be lied to, not to be a victim of theft, no matter who would do the killing or stealing or lying, and no matter what reason they offer for doing it.

The Sixth Circuit missed the whole point of Jefferson's appeal to the "Laws of Nature and of Nature's God." The point was precisely that there is a higher moral law – and a Supreme Lawgiver – to which even the monarch of the world's most powerful country must bow. In case the earthly king refuses, God's creatures could justifiably resist oppression by appeal to that same transcendent morality.

In truth and as Lincoln suggested, the Declaration of Independence is the "frame" into which the Framers placed the United States Constitution. John Quincy Adams – cited by the Sixth Circuit as Jefferson's collaborator on the Declaration[11] – said that the Constitution "was the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government."[12] Adams also stated that "[t]he Declaration of Independence and the Constitution of the United States[] are parts of one consistent whole, founded upon one and the same theory of government."[13]

The Kentucky displays include our national Bill of Rights presumably because it is our country's highest political expression of the concepts found in the Declaration of Independence: government bound to respect the equal inalienable rights of human persons. The Mayflower Compact also manifests ethical monotheism which, for the Pilgrims, meant primarily the Ten Commandments. The Compact was written "In the name of God" and "in the presence of God." The colonists covenanted together to establish "a civil body politic for our better ordering and preservation." The Magna Carta expresses the idea that the rights of man are inalienable and are God-given. Blackstone describes the declaration of rights and liberties

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[11] *Id.* at 452 n.5.

[12] Daniel L. Driesbach, *In Search of a Christian Commonwealth: An Examination of the Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 970 (1996) (quoting John Quincy Adams, *The Jubilee of the Constitution, reprinted in* 6 J. CHRISTIAN JURISPRUDENCE 2, 5 (1986)).

[13] *Id.*

in the Magna Carta as conforming to the natural liberties of all individuals which were endowed by God at creation and are vested by the immutable law of nature. It is easy to see here, too, that the Ten Commandments help us to make sense of what the Englishmen of the thirteenth century were saying.

Our National Motto – "In God We Trust" – succinctly expresses the ethical monotheism woven throughout the other documents. As this Court stated in *Lynch v. Donnelly*, the National Motto is part of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. 668, 674 (1984). The National Motto not only presupposes but also expresses America's devotion to a unitary God who acts according to a divine creative plan, for the benefit of all humankind.

The Kentucky displays include the Star Spangled Banner. The National Motto is derived from the line in the anthem that states, "And this be our motto, 'in God is our trust.'"

Lady Justice symbolizes our fair and unprejudiced system of justice and the ideals that it embodies. These ideals include the notion that men are equal in dignity and thus deserving of equal justice. In our heritage, these notions of human dignity and equality owe very much to our belief in a transcendent Creator God who has made known His will for us, through revelation and by endowing us with reason sufficient to discern important moral truths: persons with reason.

Our precious rights and liberties – political, civil, religious – are rooted in God's law. So states the Preamble to the Kentucky Constitution in terms redolent of Madison's

great *Memorial and Remonstrance*: "We the People of Kentucky [are] grateful to Almighty God for the civil, political and religious liberties we enjoy." KY. CONST. pmbl. Almost every other state constitution recognizes in its Preamble a Supreme Being; only three could be said to lack any approving invocation or reference to God.

III. Precedents From This Court and Lower Federal Courts Establish That the Bible and Biblical Morality Have a Unique Place in Our Culture and in Our Legal Tradition.

The unifying principle of the Kentucky displays is the *Memorial and Remonstrance,* combined with this Court's declaration in *Schempp.* The nine documents manifest, in varying but mutually reinforcing ways, the influence of a "Lawgiver" God upon our thinking and practices concerning human rights and limited government. The historical fact is indisputable: biblical ethical monotheism *is* that influence. No one suggests that Confucius and Muhammad played any meaningful role in our founding period. They did not. But the God who delivered the two tablets to Moses certainly did. And nothing whatsoever in this Court's precedents suggests that the Establishment Clause requires government to pretend otherwise.[14]

This Court said in *Stone v. Graham* – the case most relied upon by the court below and by the Respondents in this Court – that the Bible "may constitutionally be used in an appropriate study of history, civilization, ethics and

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[14] We discuss fully what the Establishment Clause *does* require *infra* Part V.

comparative religion, *or the like*."[15] "Or the like" indicates a potentially great range of secular subjects to which Biblical literacy – knowledge of the history, the various literary forms, and stories in the Bible – is integrally related.

One federal judge took the measure of the influence the Bible has had in our culture. The Bible is "replete" with writings relevant to such secular subjects as "history, both ancient and modern, literature, poetry, music, art, government, social customs and practices, values, [and] behavioral sciences."[16] Another federal court noted how our language and popular culture are replete with Biblical allusions, including the symbol of the American Medical Association (staff with serpent, from the Book of Numbers); the phrase "handwriting on the wall" (from the Book of Daniel); and the phrase "apple of my eye" (one of God's Old Testament descriptions of his people, Israel).[17]

Our laws, our form of government, and our political history are not understandable without reference to the biblical ethical monotheism. "Anglo-American law as we know it today," wrote one federal district court, "is ... heavily indebted to principles and concepts found in the Bible."[18] That "unique contribution" has been so great that one federal judge rested his approval of a public school Bible curriculum on this observation: "To ignore the role of the Bible in the vast area of secular subjects ... is to ignore a keystone in the building of an arch, at least

[15] 449 U.S. 39, 42 (1981) (emphasis added).

[16] Wiley v. Franklin, 468 F. Supp. 133, 149 (E.D. Tenn. 1979).

[17] Gibson v. Lee County Sch. Bd., 1 F. Supp. 2d 1426, 1431 (M.D. Fla. 1998).

[18] *Id.*

insofar as Western history, values and culture are concerned."[19] Another judge defended "the overriding importance of providing our children with a basic education in the Bible."[20] As three members of this Court recently stated: "The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (quoting *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000)).

The judicial citations could be multiplied in support of this proposition: cultural and political literacy in America *still* depend upon the Bible in a way, and to an extent, far greater than such literacy depends upon the Koran, the Bhagavad Gita, or any other religion's sacred texts. It is as simple as that.

IV. The Sixth Circuit's Mistakes Entirely Undermine Its Conclusion

The Kentucky displays are a tightly integrated set, each witnessing powerfully to an enduring commitment of the American people, expressed almost as a commonplace at the Founding and for centuries thereafter. This Court has long sanctioned, even championed, the most sublime expression of this commitment, Madison's *Memorial and Remonstrance*.

[19] *Wiley*, 468 F. Supp. at 150.

[20] Crockett v. Sorenson, 468 F. Supp. 1422, 1429 (W.D. Va. 1983).

The Sixth Circuit nonetheless somehow missed the whole point of the displays. The judges below could not see, for example, what the religious duties of believers in the First Table of Commandments had to do with the other documents. Nor did those documents "discuss" the moral norms of the Second Table. *McCreary County*, 354 F.3d at 450. But how can the reasonable observer now fail to see that the Decalogue is the implicit reference point of Madison's powerful *Memorial and Remonstrance*? For on Mount Sinai Moses received essentially this divine communication: "I am the One God and here is My moral law." Here is the Supreme Lawgiver guiding all who are willing to listen; here is the measure of action which calls forth God's blessing. Here we see, as did Madison in his *Memorial and Remonstrance*, biblical ethical monotheism anchoring our cherished liberties.

How did the Sixth Circuit stray so far off the track?

The court made four basic mistakes applying what it believed to be the *Lemon* test. Each mistake is big enough to undermine the court's legal conclusions.

First, the Sixth Circuit offered its legal conclusions – "endorsement" and "religious purpose" – as implications of its "no connection" thesis. We have seen that the thesis is false: the documents are a coherent set with a common theme. They *are* connected. But even if the court's "no-connection" thesis *were* true, its legal conclusions would not follow. Given the overwhelmingly political provenance of the texts displayed, anyone experiencing "disconnect" would conclude one of two things: either he did not fully understand the display, or one of the plaques did not belong with the others. The "reasonable observer" would not agree with the Sixth Circuit that a single puzzling or

anomalous text – the Ten Commandments – makes the whole display "religious," any more than a perplexed Supreme Court visitor who, knowing Confucius *only* in religion, would conclude that the frieze lacks a secular purpose or endorses religion.

Second, the Sixth Circuit saddled Kentucky authorities with an unprecedented burden of proof: they had to "demonstrate" a connection between the Decalogue and the other documents. We have already seen some flaws in the court's idea of a "demonstration." These flaws include the requirement that there be a "facial" connection apparent from the words on paper. We have seen that this Court laid down an entirely different approach in *Schempp*: What do the texts "evidence"? The Sixth Circuit ignored *Schempp,* and suggested that the only corrective was to integrate the Ten Commandments into a curricular offering, a full-blown course. *Id.* at 448. But the suggestion is tantamount to declaring that no passive display is constitutionally permissible. *That* is surely not the law propounded by this Court.

This Court has resisted all such *per se* rules. This Court has never said that a passive display of the Ten Commandments *even standing alone* is *per se* unconstitutional. That was the factual setting of *Stone.* Three members of this Court recently noted the "unique [factual] setting" in *Stone,* where posting the Decalogue *alone* in classrooms "effectively induced schoolchildren to meditate upon the Commandments during the school day." *City of Elkhart*, 121 S. Ct. at 2211 (Rehnquist, C.J., dissenting from denial of certiorari). Here the Ten Commandments are not alone. In the two settings at issue they are not in a schoolhouse at all. This case is scarcely the right setting for a lower federal court to depart from this Court's holdings,

and to create the first *per se* rule ever in this area of the law.

Third, the court below fixated on one claim in the courthouse prefatory description, the claim that the Decalogue provides "the moral background of the Declaration of Independence." *McCreary County*, 354 F.3d at 443. The Sixth Circuit treated it as a litmus test of the Defendants' case. To say that the court here mistook the tree for the forest would be to word the mistake charitably. And the court was wrong in concluding that the illustration fails. It works.

The Sixth Circuit fixated on a question about Jefferson's mind: was he inspired to write the Declaration's phrases about unalienable rights by the Ten Commandments, or at least by the Bible more generally? *Id.* at 452. But the mental sources of Jefferson's *draft* – whatever they were – are irrelevant to the only question that matters: What evidence does the writing itself supply about its sources and inspiration?

The Declaration of Independence was not and was never understood to be an extension of Jefferson's mind. It was signed and thus enacted by fifty-five individuals, meant by these many authors to be effective according to the common convictions of humankind. The Declaration was intended to stir all Americans to resist tyranny. It was published out of "respect to the opinions of mankind." Jefferson's private theological views – whatever they were – have nothing to do with these purposes. His idiosyncratic theology would have *impeded* wide understanding and acceptance of the Declaration. No doubt, either, that Jefferson's theology was unrepresentative. Even the historian relied upon by the Sixth Circuit – Pauline Maier

– reported on Jefferson's "heterodox religious views." *Id.* at 452 n.6.

Fourth, the Sixth Circuit misapprehended the *nature* of the connection it sought. The court did not comprehend that, because the nine texts are members of the one set, their "connection" is more vertical than horizontal. That is, they are related to each other characteristically by virtue of their common possession of a unifying principle, and not necessarily by a complex pattern of cross-fertilization: the Mayflower Compact as one part Decalogue and one part Magna Carta, and so on. The nine are rather like siblings, constituted as such by common parentage, but each one different in important ways from its brothers and sisters.

The Sixth Circuit may have been thrown off track by the fact (ably shown by Appellants' Brief below) that the specific norms in the Decalogue influenced legislation in the colonies and, later, the states. As Chief Justice Warren asserted in Oral Argument of *Murray v. Curlett*, the companion to *Schempp*: "[C]ouldn't we say th[at] ... practically all of our basic crimes ... stem from a violation of the Ten Commandments?"[21] There is certainly much historical evidence that the Decalogue played a role in the origins of the other documents that they obviously did not play in its origins. But this asymmetrical horizontal influence is *incidental* to the real unity ("connection") of the Kentucky sets. All of the documents evidence how a particular worldview – biblical ethical monotheism – shaped our thinking about rights, government, and law.

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[21] Transcript of Oral Argument at 24, Murray v. Curlett, 374 U.S. 203 (1963) (No. 119), *in* ORAL ARGUMENT OF THE SUPREME COURT OF THE UNITED STATES: THE WARREN COURT, 1953 TERM-1968 TERM (1984).

V. This Court's Precedents, Including *Stone v. Graham*, Establish the Test in This Case: The Displays Must Not Purposely Advance a Particular Religion.

The Sixth Circuit correctly stated that it had "neither the ability nor the authority to determine the 'correct' view of American history." *McCreary County*, 354 F.3d at 453. The judges were therefore obliged to accept for purposes of this litigation that biblical ethical monotheism has had a profound influence on our legal tradition, our laws, and the formation of our country. It is so. We have seen how this Court on many occasions has recognized the role of religion and of the Bible (including biblical morality) in our history. The Sixth Circuit quoted some of them. *Id.* at 450–52.

Is there any reason to nonetheless agree with the Sixth Circuit's *judgment* of unconstitutionality? What is the law governing this case? How does this Court's holding in *Stone v. Graham* apply on these facts?

This Court has abandoned many tenets of its holding in *Stone*. For one thing, the "secular purpose" test has shifted. The current statement of this requirement is from *Bowen v. Kendrick*: "Under the *Lemon* standard, which guides '[t]he general nature of our inquiry in this area,' a court may invalidate a statute only if it is motivated wholly by an impermissible purpose." 487 U.S. 589, 602 (1988) (citations omitted). *Lynch v. Donnelly* held that a secular purpose is lacking "only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." 465 U.S. 668, 680 (1984). In *Wallace v. Jaffree*, this Court said that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to

advance religion." 472 U.S. 38, 56 (1985). The *Wallace* court cited, among other cases, *Stone v. Graham*. *Id.* at 56 n.41.

The Sixth Circuit ignored these developments. It asked whether religion was the "predominant" purpose of the displays. *McCreary County*, 354 F.3d at 446. This errant statement of law may, however, be *dictum*. The court also adopted the district court's conclusion that religion was the "actual" or "primary" purpose of the displays. But then the Sixth Circuit seemed to supersede *these* conclusions. Speaking in its own voice the court concluded that Kentucky's "message" was "patently religious," as was its purpose. *Id.* at 451, 453. Finally, the court said that "Defendants intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition." *Id.* at 454.

Which precisely of these moving targets is supposed to be the real one is impossible to say. In any event, there is no basis whatsoever for saying that the Kentucky displays are motivated "wholly" by religious considerations. So far considered the "secular purpose" test is satisfied.

It is true that this court in *Stone* determined that the Kentucky legislature's purpose in *that* case was wholly religious. The conclusion seems to have been based upon the view that the Decalogue is wholly religious. In an important sense, that is obviously true: what happened on Mount Sinai is believed to be a genuine divine revelation, a religious event if ever there was one. But that sense does not rule out the possibility of considering the Ten Commandments from other perspectives, or from studying them with non-religious purposes in mind. The Decalogue can and often is studied as an example of natural law; as a

turning point in the history of an ancient people with direct modern descendants occupying the same land; as a specialized mode of expression for "religious experience"; and, most pertinently, as a pillar of the ethical monotheism which has shaped *us*.

Stone nonetheless seems to say that the Decalogue is something which, given its completely (or utterly or thoroughly) "religious" character, could *only* be displayed out of a desire to endorse religion. In other words, there could be no secular purpose for displaying the Ten Commandments.

But this is surely untrue, as this Court has since recognized and plainly said. Display of the Decalogue is not *per se* religious, as this Court has confirmed in cases subsequent to *Stone*. Three members of this Court said in 2001: "[W]e have never determined, in *Stone* or elsewhere, that the Commandments lack a secular application." *City of Elkhart*, 121 S. Ct. at 2211 (Rehnquist, C.J., dissenting from denial of certiorari). The Sixth Circuit correctly observed that *Stone* established no *per se* rule "against displaying the Ten Commandments for the purpose of demonstrating a connection with the structure of American law or government." *McCreary County*, 354 F.3d at 448. The *Stone* court itself described the Decalogue *both* as *per se* sectarian, and as at least arguably (or potentially) secular, recognizing the "arguably secular" character of matters "such as honoring one's parents, killing or murder, adultery, stealing, false witness and covetousness." 449 U.S. at 41–42. Since we are all called upon to read, and obey, if not to meditate upon and venerate, the law against murder, it is hard to see how educating schoolchildren to do so could never be a permissible state purpose.

Neither *Stone* nor any other Supreme Court ruling has squarely applied the "endorsement" test to contextual display of the Ten Commandments such as we have here. On a first look, the question – "does it endorse religion to recognize the role of biblical ethical monotheism has played in our law and our life" – seems unanswerable. Or, the answer is: in a sense, yes, and, in a sense, no. The best answer is, however, no, in the *decisive* sense: the point and effect of the Kentucky displays is about secular matters, such as human rights, basic liberties, and constitutional government, not religion.

It is important to consider, too, that to leave the biblical ethical monotheism *out* of any attempt to convey the foundations of our Republic would be *false*. To require such a *false* presentation could reasonably be taken to indicate hostility to religion, even as an intention to disparage it. To require a *false* presentation would be to substitute a nonreligious ideology for the *objective* presentation which the Sixth Circuit correctly said was required by the Constitution. To require a *false* presentation would then be unconstitutional. Establishment Clause neutrality is a two-way street. It prohibits government endorsement of a particular religion. But it prohibits as well endorsement of nonreligion or secularism.

Illeg. b/f

The problem is that "endorsement" in some limited sense seems to be part and parcel of *any* display, use, or mention of a sacred text or figure, be it the Bible, the Pieta, or the image of Muhammad. There is no constitutional basis for excluding all such efforts; no case has ever suggested nearly so draconian a measure. How, then, should one think of the "endorsement" test in this context? We think that Justice Lewis Powell correctly articulated the rule. He said in his opinion concurring in the invalidation of a

Creation Science curriculum (*Edwards v. Aguillard*): the Establishment Clause "is properly understood to prohibit the use of the Bible and other religious documents in public school education *only when the purpose of the use is to advance a particular religious belief.*" 482 U.S. 578, 608 (1987) (Powell, J., concurring) (emphasis added).

Stone is therefore to be understood to prohibit governmental display of the Ten Commandments (and, presumably, other religious texts or symbols) wherever the purpose is to promote them as demonstrating the *truth* of a particular religion (Christianity or Judaism). And there is no evidence or suggestion in this record that Kentucky is proselytizing its citizens. The displays under review here aim to promote respect for the underpinnings of our republic, not to convert people to a particular religion.

A final note on the question of whether Kentucky has endorsed a *particular* religion: the Ten Commandments appear in these displays as they are found in the Book of Exodus in the King James version of the Bible. The Decalogue appears, of course, also in Deuteronomy, and there are many translations and editions of the Bible besides the King James. Religious bodies sometimes characteristically prefer one translation or edition of the Bible, to the exclusion of others. There are "Protestant" and "Catholic" editions of Sacred Scripture.

One argument against the Kentucky displays might therefore be that *any* such undertaking has to favor one religious group over all others, because the display has to settle upon some *one* biblical translation. One translation there would have to be, but the conclusion does not follow. The relevant substance is conveyed by any translation. The substance is biblical ethical monotheism, not the

literary details of its expression. Once the reasonable observer sees the point of the display to be *that* biblical ethical monotheism shaped our political world, the observer will readily see, too, that nothing about the particular translation is part of the government's purpose. And so there is no endorsement.

There is no evidence in the record that Kentucky authorities selected the King James edition in order to promote a particular religious group or theology. In fact, the displays do not inform the viewer that he or she is reading from the King James Bible, probably in order to avoid supplying any evidence whatsoever of an endorsement. The King James Bible has long been and remains the most commonly used English language translation. From a literary standpoint, it is beyond question an important milestone in English prose, a literary production whose rhythms and phrases have been echoed in countless subsequent works of literature. *See* ADAM NICOLSON, GOD'S SECRETARIES: THE MAKING OF THE KING JAMES BIBLE xi (2003).

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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(4)

No. 03-1693

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners,

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of *Amicus Curiae* Foundation for Moral Law, Inc. Suggesting Reversal

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutionality of a display of the Ten Commandments in a county courthouse should be determined solely by the text of the Constitution.

2. Whether, according to the text of the Establishment Clause, a display of the Ten Commandments in a county courthouse is unconstitutional.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments.

The Foundation has an interest in this case because it believes that the public posting of the Ten Commandments represents an important way in which government can acknowledge the sovereignty of God and His influence (past and present) on this nation. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the displays of the Ten Commandments at issue violate the words of the Establishment Clause.

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[1] *Amicus curiae* Foundation for Moral Law, Inc. files this brief by consent of counsel for both Respondents (letter filed with the Clerk of the Court granting blanket consent to any amicus briefs) and Petitioners (letter of consent filed with this brief). Counsel for *amicus* authored this brief in its entirety. No person or entity—other than the Foundation, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The display of the Ten Commandments on public property does not violate the Establishment Clause of the First Amendment because such displays do not implicate the text thereof, particularly as it was historically defined by common understanding at the time of the Amendment's adoption. The Ten Commandments displays ("the displays") erected by McCreary and Pulaski counties ("the Counties") are therefore constitutionally unobjectionable.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case tests that bear no resemblance to or take the focus away from the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and once again to embrace the plain and original text of the Constitution to guide its Establishment Clause jurisprudence.

The text of the Establishment Clause states that "Congress shall make no *law* respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are applied to the Ten Commandments displays at issue, it becomes evident that the displays are not a law, they do not dictate religion, and they do not represent a form of an establishment. Thus, a textual analysis demonstrates that the displays of the Ten Commandments in the courthouses of the Kentucky counties are not prohibited by the Establishment Clause.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE KENTUCKY COUNTIES' TEN COMMANDMENTS DISPLAYS SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's often conflicting and always perplexing Establishment Clause precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. It is time for this esteemed Court to return to the bright-line "test" that is the very words of the First Amendment of the United States Constitution.

A. Judges are sworn to uphold the written constitutional text.

Our constitutional paradigm dictates that *the Constitution itself* and all federal laws are the "supreme Law of the Land." U.S. Const. art. VI. All judicial officers—from inferior courts to this Court—take their oath of office to support *the Constitution itself* (and no person, office, or government body). *Id.* *Amicus* respectfully submits that this Constitution and its oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of this Supreme Court.

Chief Justice John Marshall, writing for this Court, observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the very purpose of a "*written*" constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. *See*

Marbury, 5 U.S. at 176-80. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id.* at 179-80. James Madison, the "father" of the Constitution, concurred in this view, stating that, "As a guide in expounding and applying the provisions of the Constitution . . . .the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, III *Letters and Other Writings of James Madison* 228 (Philip R. Fendall ed. 1865). This Court once believed that

> [i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."

Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).

B. The words of the First Amendment have been rejected in favor of *ad hoc* judicial gerrymandering.

Today, instead of applying, or at most explaining, the words of the First Amendment, this Court has led the federal judiciary to reject the very instrument judges are sworn to uphold: "[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984). Not surprisingly, the Sixth Circuit and the district court below attempted to draw the "line" in this case and evaluated these displays of the Ten Commandments under the guise of the textual substitution devised in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), at the expense of the actual words of the Establishment Clause.

Amicus is hardly making a novel point when it suggests that the alternatives the Court has crafted in the place of the text of the First Amendment have been weighed in the balance and been found wanting. As even the Sixth Circuit admitted in this very case, several "individual Supreme Court justices have expressed reservations regarding the test set forth in [*Lemon*] for determining whether a particular government action violates the Establishment Clause." *ACLU of Kentucky v. McCreary County, Kentucky*, 354 F. 3d 438, 445 (6th Cir. 2003).[2] These "reservations" are no doubt due in part to the myriad of results in the circuits throughout the country concerning religious displays. As the petitioners observed in their certiorari petition, just in cases involving the display of the Ten Commandments there have been decisions in the Third, Fifth, Tenth, and Eleventh Circuits that have arrived at different conclusions than the Sixth Circuit has in this case. *See Freethought Soc'y v. Chester County*, 334 F.3d 247 (3d Cir. 2003); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003); *Anderson v. Salt Lake Counties Corp.*, 475 F.2d 29 (10th Cir.

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[2] The Sixth Circuit's expression of frustration over the current state of Establishment Clause jurisprudence is mild compared to its fellow circuits'. For example, the Third Circuit Court of Appeals has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000); the Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999); and the Tenth Circuit opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

2002); and *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).

This confusion and criticism should not come as a surprise. When the policy of this Court is to eschew a "fixed *per se* rule," predictability in decision-making—a hallmark of true law—is also jettisoned. This Court should seek to provide a First Amendment jurisprudence that enjoys an "evenhanded, predictable, and consistent development of legal principles, [that would] foster[] reliance on judicial decisions." *Payne v. Tenn.*, 501 U.S. 808, 827 (1991); *see, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867-68 (1992).

The jurisprudential experiments with various extra-textual "tests" have produced a continuum of disparate results, often because of an attempt to achieve a "neutrality" concerning religion. *See e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) ("[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion relevant in any way to a person's standing in the community'"). But in so doing, this Court has strayed from the foundational principles of our constitutional system.

C. Textual infidelity has papered over America's history and constitutional government that *embraces* acknowledgments of God and public expressions of religion.

Our United States was never intended to be "neutral" on the issue of God. The Pilgrims landing at Plymouth Rock in 1620 each signed the *Mayflower Compact*, which declared that they had "undertaken for the Glory of God and Advancement of the Christian Faith, and the Honour of our King and Country, a voyage to plant the first colony in the northern Parts of Virginia . . . " *Our Nation's Archive: The History of the United States in Documents* 46 (Bruun & Crosby eds. 1999). In the *Fundamental Orders of Connecticut* of 1639, the first permanent governing document of that colony and a forerunner of several colonial constitutions, the people stated that they desired "an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require." *Colonial Origins of the American Revolution: A Documentary History* 211 (Donald S. Lutz ed. 1998).

The prominence of God in our nation's development continued during and after the American Revolution. God is referenced four times in the Declaration of Independence: He is called our "Creator" Who "endowed" us with "certain unalienable rights"; "Nature's God" Who instituted the "Laws of Nature"; the "Supreme Judge of the world"; and the One on Whom the Founding Fathers called upon for "the protection of divine Providence," as they pledged themselves to the cause of independence. *See Declaration of Independence* (U.S. 1776). Demonstrating that these references were not mere rhetorical flourish, the Continental Congress, on November 1, 1777, declared a day of national thanksgiving even in the midst of the war for independence because they believed "it is the indispensable Duty of all Men to adore the superintending Providence of Almighty God; to acknowledge with Gratitude their Obligation to him for benefits received, and to implore such further Blessings as they stand in Need of." *First National Proclamation of Thanksgiving, reprinted in* William J. Federer, *America's God and Country* 147 (1994). James Madison stated in *Federalist No. 37* that he believed that those who had participated in the Constitutional Convention of 1787 had "surmounted with an unanimity almost unprecedented" "so many difficulties" that "[i]t is impossible, for the man of pious reflection, not to perceive in it a finger of that Almighty Hand, which has been so frequently and signally extended to our

relief in the critical stages of the revolution." J. Madison, *The Federalist No. 37* 185 (George W. Carey & James McClellan eds. 2001).

Not only was the nation at its founding not neutral toward God, but also, as this Court noted in *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963), "religion has been closely identified with our history and government." The Declaration's primary author, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX, (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered like the Declaration of Independence to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance of 1789, Article III, *reprinted in America's God and Country*, at 484.

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854).

The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

S. Rep. No. 32-376 (1853).

As late as 1954 when Congress placed the words "under God" in the Pledge of Allegiance, President Dwight Eisenhower explained that such had been done to "reaffirm[] the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war." Speech of June 14, 1954, *reprinted in* William J. Federer, *Treasury of Presidential Quotations* 313-14 (2004).

These quotes from important figures throughout the history of the United States illustrate what this Court affirmed in *Abington*: "[T]hat the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Abington*, 374 U.S. at 213. Thus, the Constitution was not intended to require, nor until relatively recently was it interpreted to require, that God must be devalued in the public square in an attempt to achieve "neutrality" which supposedly prevents the possibility of some passerby suffering offense at the mention of God.

D. This Court should return to the fixed rule of the constitutional text.

Despite the obvious intention of the Constitution, made manifestly plain by the text of the First Amendment, this Court

has elected to stray from text and instead has formulated tests, *e.g.*, *Lemon*, "endorsement," "coercion," in the name of a kind of "neutrality" toward religion that is historically inaccurate and practically impossible to achieve. When the Court does this, it steps outside its proper role as an interpreter of the *text* and lays aside judicial robes in exchange for legislative pens, which is exactly what the Constitution, and the Establishment Clause in particular, is supposed to prevent.

Chief Justice Marshall asked in *Marbury*, "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?" 5 U.S. at 180. One dissenter in the infamous case of *Dred Scott* chastised the errant majority for not only rejecting the fundamental worth of a person, but the fundamental principles of constitutional interpretation. This Court would do well to consider Justice Benjamin Curtis's 148-year-old but still-relevant warning:

> And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

Dred Scott v. Sandford, 60 U.S. 393, 620-621 (1856) (Curtis, J., dissenting).

For too long, the "strict interpretation of the Constitution" has been abandoned, and "fixed rules" no longer govern Establishment Clause cases. This Court ought to decide this case according to the plain, and still unsullied, text of the First Amendment's Establishment Clause. *See Marbury*, 5 U.S. at 180.

II. THE KENTUCKY COUNTIES' COURTHOUSE TEN COMMANDMENTS DISPLAYS ARE NOT UNCONSTITUTIONAL BECAUSE THEY ARE NOT "LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend I. Whether the Ten Commandments were displayed alone or surrounded by a context of historical documents, in no way could the Counties' act of erecting the Ten Commandments be a "law respecting an establishment of religion."[3]

A. Neither the displays, nor the Counties' actions in relation to the displays, are "law[s]."

The Establishment Clause on its face restricts "laws," and this Court has recognized that the Clause was designed to restrict the exercise of "legislative power." *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). In "religious display" cases, however, this Court has, in effect, expanded its own power by unconstitutionally amending the Establishment Clause, ruling that the Clause may be violated

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[3] *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

either by a "statute or practice." *See Allegheny*, 492 U.S. at 592. Contrary to *Lemon*'s claim that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that this Court, therefore, "must draw lines" delineating what is constitutionally permissible, the text of the Establishment Clause contains a definite, straightforward meaning. *Lemon*, 403 U.S. at 612.

In its review of this case, the Sixth Circuit, like the district court below, incorrectly assumed that the actions of the Counties in erecting the courthouse displays that included the Ten Commandments amounted to "laws." However, not every action taken by a county under its constitutional and statutory authority constitutes a law.

At the time of the ratification of the First Amendment, Sir William Blackstone had defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Noah Webster's 1828 Dictionary states that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original).

The Counties have made no law. By erecting these courthouse displays, the Counties do not command any action from their residents, nor do they restrain them from any action or conduct that they wish to pursue. Likewise, the Counties have not stated or implied any intent to command their residents to perform any action or to prohibit their residents from any conduct by means of the courthouse displays. McCreary and Pulaski counties, like all Kentucky counties, have the statutory authority to "enact ordinances [and] issue

regulations" in performance of certain public functions. Ky. Rev. Stat. Ann. § 67.083(3) (Banks-Baldwin 2000). The Counties did not use their lawmaking authority; instead, they put up a wall display.

The Ten Commandments displays are simply displays on the wall of a government building, not an "ordinance" or "regulation" enacted or enforced by the Counties. In fact, there is no allegation by the plaintiffs of coercion of any kind; instead, they alleged merely that "they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business." *ACLU of Kentucky v. McCreary County, Ky.*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000).

Similar to an executive Thanksgiving proclamation, the courthouse displays "ha[ve] not the force of law, nor [were they] so intended." *Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) ("The proclamation . . . is but a recommendation. . . . The duties of fasting and prayer are voluntary, and not of compulsion, *and holiday is a privilege, not a duty*. . . . It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor"). At most, it could be argued that the courthouse displays serve as a *reminder* to citizens of certain standards of conduct. Thus, because the courthouse displays that include the Ten Commandments are not "law[s]," the Counties' displays do not violate the Establishment Clause.

B. The Counties' courthouse displays do not respect "an establishment of religion."

The Ten Commandments displays at issue do not violate the Establishment Clause because they do not "respect," *i.e.*, concern or relate to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added.)

1. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, in James Madison's *Memorial and Remonstrance*, and was embraced by this Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[4] "Religion" was defined as: "The duty which we owe to our Creator, and the manner of discharging it." Va. Const. of 1776, art. I, § 16; *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, this Court considered and rejected the argument that the First Amendment definition of religion included the practice of polygamy. In arriving at its conclusion, the Court applied the definition of "religion" contained in the Virginia Constitution as controlling the meaning of that term in the First Amendment. *Reynolds*, 98 U.S. at 163-66. It thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, "within the legitimate scope of the power of . . . civil government." *Id.*

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[4] The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

In *Beason*, the Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion."

> The term "religion" has *reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will*. . . . The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience . . . .

Beason, 133 U.S. at 342 (emphasis added).

In *Macintosh*, this Court's decision resulted in the denial of the respondent's application for citizenship by naturalization because the respondent refused to take an oath to bear arms in defense of the United States on the ground that he would have to believe the war in question was morally justified before he would take such action. 283 U.S. at 613-14, 618.[5] Chief Justice Hughes dissented in *Macintosh*, believing that the respondent's refusal to take the oath based on religious principle ought not disqualify him from citizenship. In part, Chief Justice Hughes reasoned:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, . . . : "The term 'religion' has reference to one's

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[5] The *Macintosh* decision was later reversed by this Court in *Girouard v. United States*, 328 U.S. 61 (1946).

> views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.

Macintosh, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Thus, Chief Justice Hughes's dissent in *Macintosh* was rooted in the historic constitutional definition of religion, a definition that presupposes God.

Sixteen years later in *Everson*, this Court noted that it had "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 Act for Establishing Religious Freedom]." *Everson*, 330 U.S. at 13. The "Virginia statute" explicitly founded its declaration of religious freedom on the basis that "Almighty God hath created the mind free" and that "all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy Author of our religion . . . ." Virginia Act for Establishing Religious Freedom (1785), *reprinted in* 5 *The Founder's Constitution* 84 (Kurland and Lerner eds., U. Chi. Press: 1987).

The *Everson* Court also emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id.* at 12. Indeed, Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution.

For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64.

Thus, this Court has recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16; *see also*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship"). Assuming, *arguendo*, that the Counties' actions of erecting the courthouse displays are in some sense "law[s]," such action cannot be considered laws concerning "religion" because, while the Ten Commandments address duties owed to the Creator, they do not address the *manner* of discharging those duties. For example, the commandment to "honor thy father and thy mother" does not dictate how this command is to be fulfilled; indeed, different religions and sects (*i.e.*, Protestantism, Catholicism, Judaism, Islam, etc.) detail different ways in which to fulfill this commandment. Something that constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do), but also *how* those commands and prohibitions are to be carried out. The Ten Commandments, by themselves, do not do both of these and hence cannot be considered a "religion" under the constitutional definition of the term.

Instead, these displays, by including the Ten Commandments, acknowledge God as the moral and historical foundation of the country's legal system. Examples of such acknowledgments are replete throughout our history. Thanksgiving proclamations encouraging citizens to offer gratitude to God for "His kind care and protection" have been

issued by Presidents of the United States ever since George Washington issued the first one on October 3, 1789. *See* 4 *The Papers of George Washington, Presidential Series* 131-32 (W. W. Abbot et al. eds. 1987). Since the passage of the Judiciary Act of 1789, all federal judicial officers have been required to take an oath of office swearing to support the United States Constitution that concludes with the phrase, "So help me God." *See* 28 U.S.C. § 453.

"In God We Trust" was first placed on the nation's coinage in 1864 to demonstrate, as then-Secretary of the Treasury Salmon P. Chase explained, the "[n]ational recognition" of "[t]he trust of our people in God." *See Fact Sheets: Currency & Coins—History of "In God We Trust,"* United States Department of the Treasury, *at* http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.html. The motto has appeared on all U.S. coins since 1938 and on all currency since 1964. *Id.*

As was previously mentioned, the words "under God" were added to the Pledge of Allegiance in 1954. *See* 4 U.S.C. § 4. The report from the House of Representatives that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 83-1693, at 2 (1954).

Posting the Ten Commandments, particularly in public facilities in which the law is adjudicated, represents another acknowledgment of God fitting with the tradition and obligation performed throughout the nation's history. Under no version of the facts presented could it be said that these courthouse displays represent an attempt by the Kentucky Counties to dictate the duties that their residents owe to the Creator, or to enforce the manner in which the residents should

discharge those duties. Consequently, the courthouse displays are not laws respecting an establishment of "*religion*."

2. The definition of "establishment"

Even if it is assumed that the courthouse displays are "law[s]" under the First Amendment—which they are not—and even if it is assumed that the displays pertain to "religion" under the First Amendment—which they do not—the courthouse displays do not represent an "establishment" of religion.

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II J. Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong.* 757 (1789) (Gales & Seaton's ed. 1834). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to

> teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. There never was an established religion without all these.

H.R. Rep. No. 33-124 (1854).

At the time of its adoption, therefore, "[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states." Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992). This Court's precedent is in agreement with this assessment, as the Court concluded that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970).

The Counties' courthouse displays that include depictions of the Ten Commandments do not in any fashion represent the setting up of a state-sponsored church, nor do they in any way lend government aid to one faith over another. Indeed, the text of the Ten Commandments used in the displays is simply taken directly from the King James Version of the Bible and does not include a numbering of the commandments, thus it is a deliberately non-sectarian version of the Ten Commandments. *McCreary*, 354 F.3d at 443 n.2. Moreover, the displays require negligible upkeep by the Counties.

This Court and multiple lower courts have recognized that the Ten Commandments hold an important place in this country's historical and legal tradition. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) ("the Ten Commandments [did not] play[] an exclusively religious role in the history of

Western Civilization."); *King v. Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) ("Much of our private and public law derives from these final six commandments."); *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003) ("Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society."); and *Books v. Counties of Elkhart, Indiana*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.").

Given the undeniable general influence of the Ten Commandments in this country's historical and legal tradition and the lack of any showing that the Counties' courthouse displays show support for or give aid to a particular church or religious sect, the displays cannot be said to concern an "*establishment*" of religion. Therefore, no portion of the Establishment Clause of the First Amendment prohibits public displays of the Ten Commandments.

CONCLUSION

For the reasons stated, this Honorable Court should reverse the Court of Appeals' decision below and hold that the Ten Commandments displays at issue do not violate the United States Constitution, that is, the text thereof.

Respectfully submitted,

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December 8, 2004

Supreme Court, U.S.
FILED
JAN 7 - 2005
OFFICE OF THE CLERK

No. 03-1693

IN THE

Supreme Court of the United States

McCreary County, Kentucky, et al.,
Petitioners,

v.

ACLU of Kentucky, et al.,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF FREEDOM FROM RELIGION FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation, Inc. (the "FFRF") is a non-profit educational group whose two primary purposes are to promote the constitutional principle of separation of state and church and to educate the public on matters relating to nontheism.[1] The FFRF was incorporated in Wisconsin in 1978, and it now has more than 5,000 members, who generally describe themselves as "freethinkers," a label intended to include atheists, agnostics and rational skeptics of any pedigree. Those who identify themselves as secular or non-believers are a substantial and rapidly growing segment of the American population, constituting ten to fourteen percent of the adult population in 2001.[2]

The activities of the FFRF are described in the brief amicus curiae filed by the FFRF in the appeal of *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346

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[1] The parties to this appeal have consented to the FFRF's filing of this brief amicus curiae. The Respondents' blanket consent to the filing of briefs amicus curiae is on file with the Court, and the Petitioners' written consent to the FFRF's filing is submitted with this Brief. Pursuant to Supreme Court Rule 37.6, the FFRF states that no counsel for any party authored this brief in whole or in part and that no party or entity other than the FFRF, its affiliates, or counsel made a monetary contribution to the preparation or submission of this brief.

[2] Barry A. Kosmin & Egon Mayer, *American Religious Identification Survey*, Key Findings, available at http://www.gc.cuny.edu/studies/key_findings.htm (last visited January 4, 2005).

(2004). Accordingly, that information will not be repeated in full here. The FFRF's activities include a variety of educational programs and, when necessary, litigation. More information about the FFRF, its programs, and its legal successes is available at its web site, www.ffrf.org.

The FFRF is particularly concerned with the display of the Ten Commandments on government property, which has the effect of casting non-believers as outsiders to the political community. That concern has motivated the FFRF to challenge a number of such displays, notably those in the form of the monuments donated by the Fraternal Order of Eagles in the 1950s and 1960s. *See, e.g., Mercier v. City of La Crosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004), *rev'd* 2005 U.S. App. Lexis 9 (7th Cir. Jan. 3, 2005).

The FFRF's concern with the display of the Ten Commandments led it to file an amicus brief in the *Van Orden* appeal, which involves an Eagles Ten Commandments Monument. The FFRF's amicus brief suggests several principles concerning how the endorsement test proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984), should be applied to the display of the Ten Commandments. In this amicus brief, the FFRF would like to show how those principles apply to the "Foundations Display" at issue in the appeal of *American Civil Liberties Union v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004).

SUMMARY OF THE ARGUMENT

This Court should not overrule *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but it should refine the *Lemon* test by expressly adopting the endorsement test articulated by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring). The endorsement test properly protects the political standing of non-believers and other religious minorities, who cannot participate equally in the civic life of the nation if government is allowed to endorse specific religious precepts, such as those expressed in the Ten Commandments. In applying the endorsement test, a reviewing court should consider the governmental purpose in displaying religious material, because the speaker's intent is part of the meaning conveyed by any act of communication. The governmental purpose in displaying religious material is no more difficult to determine and evaluate than legislative intent, which routinely guides judicial statutory interpretation.

The FFRF's amicus brief in *Van Orden* suggests two principles concerning how the endorsement test should be applied to the display of the Ten Commandments—principles that are usefully applied to this case. First, certain governmental purposes, such as "commemoration," cannot be evaluated in the abstract apart from the object of commemoration. The commemoration of a predominately religious object is not a genuinely secular purpose. So it is with the purportedly secular "educational" purpose of the Foundations Display at issue in this case. The government's intent to "educate" citizens that the Ten Commandments provides the moral foundation of the Declaration of

Independence is not a genuinely secular purpose. Such "education" is tantamount to the government's declaration that ours is a Christian nation, which is an impermissible endorsement of religion.

Second, the display of a religious text, more than the display of religious imagery or symbols, inevitably tends to suggest endorsement. The Ten Commandments is an inherently religious and intensely sectarian text, and the context of the Foundations Display enhances, rather than diminishes, the message of government endorsement of religion. To any reasonable observer, the Foundation Display states that our nation is devoted to, and divinely guided by, the God of the Bible.

ARGUMENT

I. This Court should expressly adopt Justice O'Connor's endorsement test for evaluating the governmental display of religious texts and symbols.

For more than three decades, this Court's Establishment Clause jurisprudence has been guided by some version of the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Although a majority of this Court has criticized *Lemon* at one time or another, another majority appears prepared to embrace Justice O'Connor's endorsement analysis, based on *Lemon*, which she articulated in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), and which she has refined in several cases since, notably *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 623-37 (1989) (O'Connor, J., concurring). Under the endorsement test, the Establishment Clause of the First Amendment is violated by

> government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch, 465 U.S. at 688.

A. The endorsement test protects the political standing of non-believers and members of other religious minorities.

The endorsement test does not permit government hostility, or even mandate silence, on the subject of religion. *C.f., Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). But the endorsement test does require that the government not take sides, or even appear to take sides, on issues of religious faith. This neutrality is constitutionally required not because it protects the *feelings* of members of religious minorities, but because, as *Lynch* makes clear, it protects *their standing in the political community*. Religious beliefs are, as numerous amici have pointed out,[3] vitally important to a majority of Americans. It is precisely *because* of the intensity of religious feelings among so many people that government must remain scrupulously neutral in religious matters. A member of a religious minority simply cannot participate in the political process on an equal footing when the government itself appears to embrace the views of the religious majority.

The problem is particularly acute for non-believers. Earlier in our nation's history, our notion of religious diversity encompassed only diversity among Christian sects, and it would have seemed appropriate for our government to ignore Jews and other religious minorities in its acknowledgment of the religious beliefs and practices of our citizens. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). But today, even passive anti-Semitism on the part of government would be an outrage; even proponents of the governmental display of the Ten Commandments apparently accept the necessity of acknowledging the beliefs of Jews, who constitute approximately two percent of the American population.[4] But the Petitioners in this case would permit the government to disregard the convictions of non-believers, who now constitute between ten and fourteen percent of the United States population.[5]

Of course, non-believers risk more than being disregarded. Those who publicly criticize governmental involvement in religion are commonly subjected to abuse. This abuse is sometimes so severe that plaintiffs in Establishment Clause cases are allowed to proceed anonymously. *See, e.g., Doe v. Harlan County School Dist.*, 96 F. Supp. 2d 667, 670 (E.D. Ky. 2000) (permitting plaintiffs to proceed anonymously with challenge to display of Ten Commandments); *Doe v. Stegall*, 653 F.2d 180, 185 (5th

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[3] *See, e.g.*, Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners (filed Dec. 8, 2004 in No. 03-1693); Brief of the American Legion as Amicus Curiae In Support of Petitioners (filed Dec. 8, 2004 in No. 03-1693).

[4] The Harvard Pluralism Project: Statistics by Tradition, available at http://www.pluralism.org/resources/statistics/tradition.php (last visited Jan. 5, 2005); *see also* American Religious Identification Survey, *supra* note 2.

[5] American Religious Identification Survey, *supra* note 2.

Cir. 1981) (permitting plaintiffs to proceed anonymously with challenge to prayer and Bible reading exercises in public school); *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004) (affirming challenge by parents of school children and FFRF to Bible classes in public schools in which individual plaintiffs were allowed to proceed anonymously). FFRF personnel are themselves commonly subjected to intense harassment and physical threats as a result of their advocacy of the separation of church and state. As one federal court summed up the situation faced by the FFRF and the plaintiffs in a challenge to the display of the Ten Commandments:

> It would be a refreshing surprise if the [plaintiffs] were spared the vituperation customarily heaped upon plaintiffs in lawsuits of this sort. But that's not likely. Given what usually happens in these cases and given what has already been said, the defenders of the Ten Commandments likely will continue their verbal assault on the [plaintiffs] and the FFRF. Religious challenges are not for the faint of heart and the [plaintiffs] probably realized this before they decided to file their complaint.

Mercier v. City of La Crosse No. 02-C-0376-C (W.D. Wis. July 29, 2002) (order denying plaintiffs' motion to proceed anonymously). Such zealotry is not characteristic of the majority of Americans, but the pervasiveness of this abuse demonstrates the intensity of feeling that prevents the non-believer from participating equally in the political process.

The ultimate question in this appeal, as in *Van Orden*, is

whether government may declare ours to be a nation of God—or even a Christian nation—so long as no one is compelled to worship against their belief. But this is not a genuine religious freedom: we are not truly free to worship or not as we choose if we can exercise that freedom only by sacrificing our full participation in the political community. Only the endorsement test protects the rights of religious minorities to full participation in the political community.

B. The government's intended purpose is a proper consideration under the endorsement test.

The primary difference between the *Lemon* test and the endorsement test is the role of the government's purpose in the Establishment Clause analysis. Under the purpose prong of the *Lemon* test, a government act is unconstitutional unless it has a secular purpose. *Lemon*, 403 U.S. at 612. Under the endorsement test, the proper inquiry is "whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

Critics of the *Lemon* test contend that the inquiry under its first prong into governmental purpose is improper because it leads the reviewing court to "psychoanalyze" individual government officials, which focuses on irrelevant personal motives and produces inconsistent results. Brief for Petitioners at 36-39 (filed Dec. 8, 2004 in No. 03-1693) (citing *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting), and *Wallace v. Jaffree*, 472 U.S. at 108 (Rhenquist, J., dissenting)). The endorsement test is not concerned with

the private motives of government officials and it avoids this problem. Under the endorsement test, governmental intent is one factor that determines whether observers will view a display of religious material as an endorsement of religion.

The government's intent is a relevant consideration under the endorsement test because a speaker's intent is a significant component of the meaning of the message conveyed. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). The meaning we take from any act of communication, whether a conversation, a work of art, or a symbolic display, is determined in large measure by the inferences we draw about the speaker's intent. For example, the utterance "nice job" means one thing when it is said by someone who we believe intends a sincere compliment, but it means quite another thing when said by someone who we believe intends to criticize. To the extent that we know, or can infer from the circumstances, what was intended by an act of communication, that knowledge greatly influences the meaning of the communication. In fact, some contemporary linguists contend that inferences about the intent of the speaker are more important to the meaning conveyed to the recipient than the conventional content derived from word meanings and syntax. *See, e.g., Radical Pragmatics* (Peter Cole, ed., 1981); Dan Sperber and Dierdre Wilson, *Relevance: Communication and Cognition* (1986).

This concern for governmental intent does not mean that the endorsement test must focus on the "subjective motives" of government officials, as the Petitioners suggest. Brief for Petitioners at 7, 36-39. This Court has made clear that the

actual mental state of the individual legislator or government official is immaterial to the Constitutionality of the governmental act. *See, e.g., Wallace v. Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring). For example, a legislator may be subjectively motivated purely by religious conviction to vote for a public welfare program without posing any Establishment Clause problem. No reasonable observer would consider a public welfare program to communicate an endorsement of religion because some—or even all—of the legislators who voted for it were motivated by Christian charity.

The issue is not the subjective motives of the individual legislator or official; the issue is the government's intended purpose, which is demonstrated by the public acts and statements of the government itself. Thus conceived, the governmental purpose for a religious display is no more difficult to discern than the legislative intent behind a statute, and reviewing courts discern this legislative intent every day in the process of statutory interpretation. In so doing, a court does not "psychoanalyze" the individual legislator, the court discerns the purpose of legislation by analyzing the terms of the legislation itself, its context, statements of legislative purpose, and legislative history. The legislative intent is determined through a rational, objective process from the public statements and acts of the government. Discerning legislative intent is sometimes a difficult process, but the answer to the question "What was the legislature trying to do?" is nevertheless crucial to determining the meaning of a statute.

Under the endorsement test, reviewing courts must

conduct a similar analysis of the governmental purpose behind display of religious texts or symbols. The reasonable observer will be aware of that purpose as it is disclosed in the government's public acts and statements. To put it simply, the answer to the question "What was the government trying to do?" will bear heavily on whether a display of religious texts or symbols communicates the government's endorsement of religion.

Petitioners suggest that the governmental purpose underlying previous versions of the Foundations Display should be irrelevant to the analysis of the current versions of the display. Brief for Petitioners at 13-15. In other words, Petitioners contend that once a government alters a religious display, or articulates a new purpose for a religious display, that display should no longer be "tainted" by the government's previous illegitimate purposes. The Court must reject Petitioner's argument both because it is illogical, and because it invites abuse. Whether a previous purpose is relevant to a subsequent display will depend on the relationship between the original display and the new version. In many cases, the original purpose will endure, just as the meaning of an amended statute may be informed by the legislative intent behind the statute as originally enacted. If the altered display appears to advance the original purpose, that original purpose should still be considered under the endorsement test.

The alternative invites abuse, because it would allow a government to remove the "taint" of an improper religious purpose through the expedient of a minor alteration of the display accompanied by the articulation of a new, allegedly

secular, purpose. If the alteration of the display does not completely negate the endorsement of religion, the original purpose of the display remains a factor that a reviewing court should consider under the endorsement test, because it will, if known, influence the meaning of the display.

Petitioners ask the Court to abandon entirely the consideration of governmental purpose in its Establishment Clause jurisprudence. Because governmental purpose is highly relevant to whether a display of religious material communicates endorsement, the Court must not do so.

II. Under the endorsement test, the "Foundations Display" in the courthouses violates the Establishment Clause.

A. The Foundations Display does not have a genuinely secular purpose.

Certain governmental purposes, such as "commemoration," cannot be evaluated in the abstract because whether they are truly secular depends on the object being commemorated. In its amicus brief in *Van Orden*, the FFRF identified these as "transitive purposes," because they require an object to complete their meaning. A transitive purpose is not genuinely secular unless both its object and the means of accomplishing it are secular. The concept of the transitive purpose can be usefully applied to the purposes proffered by the Petitioners for the Foundations Display at issue in this appeal. None of those purposes is genuinely secular.

The first proffered purpose is "to erect a display

containing the Ten Commandments that is constitutional." *McCreary County*, 354 F.3d at 446. Although there is certainly nothing wrong with a government seeking to conform its conduct to the Constitution, this purpose is not genuinely secular. Applying the *Lemon* test, the Sixth Circuit properly rejected this purpose as question-begging, because it "fails to shed any light on [the Petitioners'] motivation for creating the displays." *Id.* at 447. But the Sixth Circuit's analysis can be refined under the endorsement test, where the Petitioner's private motives are not truly at issue. What matters under the endorsement test is that one who sees the Foundations Display and asks "what is the government trying to do?" would not infer that the government had a secular purpose in "trying to erect a display containing the Ten Commandments that is constitutional."

"Erecting a constitutional display of X" is a transitive purpose whose secularity cannot be evaluated apart from X itself. If X is religious, so is the stated purpose of displaying X. Imagine that the Petitioners had offered instead the purpose of "erecting a constitutional display of an inherently religious text," or even "declaring that McCreary County is a Christian county in a constitutional manner." Both of these purposes would be rejected as manifestly religious. The purpose of "erecting a display containing the Ten Commandments that is constitutional" is also transparently religious. To the extent that this purpose is offered as a public justification of the Foundations Display, the observer's awareness of that purpose contributes to the display's message of governmental endorsement.

The Petitioner's second purpose is "to demonstrate that

the Ten Commandments were part of the foundation of American Law and Government." *McCreary County*, 354 F.3d at 446. The remaining purposes are variations on this theme, expressing the government's purported intent to "educate" citizens about the role the Ten Commandments played as part of the "moral background" to the Declaration of Independence and our legal tradition.

"Education" is, like "commemoration," a transitive purpose. One cannot determine whether the purpose "to educate citizens about X" is secular apart from determining whether X is itself genuinely secular. Although it may be an appropriate government purpose to inform students about the diversity of religions and non-religious viewpoints, the government does not have a genuine secular purpose if it attempts "to educate citizens about the life of Christ and His path to salvation." As the Sixth Circuit properly recognized, the claim that the Ten Commandments is *the* foundation of the Declaration of Independence and our legal tradition is itself a manifestly religious precept. *Id.* at 454. "Educating" citizens to this manifestly religious conception of our civic history is not a genuinely secular purpose.

The manifestly religious notion that the Ten Commandments are the foundation of the Declaration of Independence is also demonstrably false. According to the website of the National Archives, which describes in great scholarly detail the background, content, and impact of the Charters of Freedom, the foundation of The Declaration of Independence is the predominately secular philosophy of the Enlightenment:

> Here, in exalted and unforgettable phrases, Jefferson expressed the convictions in the minds and hearts of the American people. The political philosophy of the Declaration was not new; its ideals of individual liberty had already been expressed by John Locke and the Continental philosophers.

The National Archives Experience, Charters of Freedom, Declaration of Independence, available at http://www.archives.gov/national_archives_experience/charters/declaration.html (last visited Jan. 6, 2005). Consistent with Locke's philosophy, the Declaration of Independence speaks of "Governments . . . instituted among Men, deriving their just powers from the consent of the governed," not a government ruled by divine authority. References by Jefferson, a non-Christian, to "Nature's God" and the "Creator" are not references to the God of the Bible. Only by the most convoluted logic can anyone contend that the Ten Commandments inspired Jefferson's call to revolution against the king of England.

The Sixth Circuit based its decision on a careful analysis of the specific assertions and historical material presented in the Foundations Display. *McCreary County*, 354 F.3d at 451-54. The Sixth Circuit concluded that it would be constitutionally permissible to integrate the Ten Commandments into an "objective historical display," but the government could not "go out of its way to stress the proposition that the Ten Commandments formed the foundation of the Declaration of Independence while utterly ignoring (and implicitly denying) all other influences." *Id.* at 453. Obviously, bad scholarship by the government is not a

constitutional violation in and of itself. But when a government purports to justify the display of religious material as "education," the content of that education is not beyond constitutional scrutiny. In *Stone v. Graham*, 449 U.S. 39 (1980), this Court acknowledged that the Ten Commandments can be presented by government as playing a role in our civic life, such as when it is "integrated into the school curriculum . . . in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42 (citing *Abington School Dist.*, 374 U.S. at 225). No reasonable person infers from the inclusion of religion in a properly objective school curriculum that the government intends to endorse religion. But when the purported "education" does not bear the hallmarks of scholarly integrity and objectivity, and instead distorts history to valorize a religious text, the intent to endorse religion is self-evident.

The dissent in *McCreary County*, 354 F.3d at 468 (Ryan, J., dissenting), and several amici[6] contend that the Foundations Display is justified as an acknowledgment of the substantial influence of religion on American history. But this misses the point: to commemorate or celebrate the influence of a specific highly religious text on our nation's history communicates the government's intent to endorse that religious text. In the early days of the Republic certain religious principles in the Ten Commandments were reflected in the laws of the states. But a contemporary

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[6] See briefs cited in note 3, *supra*.

government cannot rummage through our nation's past, choosing to celebrate antiquated religious laws that would now be unconstitutional. Such celebration unmistakably demonstrates the government's intent to communicate its endorsement of religion.

B. The Foundations Display communicates the government's endorsement of religion.

The second question under the endorsement test is whether, regardless of intent, "a government practice [has] the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).[7] The Foundations Display plainly has the effect of communicating religious endorsement.

1. The text of the Ten Commandments is inherently religious and highly sectarian.

The text of the Ten Commandments is inherently religious, as this Court recognized in *Stone*, 449 U.S. at 41-42. Remarkably, the Petitioners and several amici contend that

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[7] This articulation is a refinement of the second prong of the *Lemon* test, which asked whether the government practice had the principal or primary effect of advancing or inhibiting religion. *Lemon*, 403 U.S. at 612. As interpreted by Justice O'Connor in *Lynch*, the effect test does not require the invalidation of a government act that has the effect of advancing religious interests, so long as the act does not communicate the government's own endorsement of religion. 465 U.S. at 691-92.

the Ten Commandments are non-sectarian—or even essentially secular. Brief of Petitioners at 45. But the intensely sectarian nature of the Ten Commandments is carefully demonstrated in the Brief of Amici Curiae Anti-Defamation League, et al. (filed Dec. 13, 2004 in Nos. 03-1500 and 03-1693) and the Brief for the Hindu American Foundation, et al. (filed Dec. 13,2004 in No. 03-1500). These briefs make clear that the God of the Ten Commandments is not the non-sectarian Creator referred to in the Declaration of Independence, but only the Judeo-Christian God of the Bible, and arguably only the Christian God. Brief of Amici Curiae Anti-Defamation League, et al. at 22-26 (demonstrating that the displays at issue in *Van Orden* and in this case are either homogenized or specifically Christian versions of the Ten Commandments that are offensive to many Jews).

In attempting to secularize the Ten Commandments, Petitioners overlook a crucial distinction between the religious icons and symbols at issue in *Lynch* and *Allegheny* and the religious text of the Ten Commandments at issue in *Stone*. Religious icons and symbols are open to a broader range of interpretation than religious texts, which necessarily express specific religious precepts. As explained in the FFRF's amicus brief in *Van Orden*, the figure of Moses as part of an allegorical display can represent a traditional symbol of law-giving, *Allegheny*, 492 U.S. at 651 (Stevens, J., concurring in part and dissenting in part), but the text of the Ten Commandments expressly states "I AM the LORD thy God; Thou shalt have no other gods before me." Outside of an objective scholarly context, the display of this text will inevitably suggest endorsement.

The Petitioners and certain amici suggest that the display of the text of the Ten Commandments has the same effect as the display of an image of Moses. For example, according to the Brief of Amici Curiae The States of Indiana, Alabama, et al. (Filed Dec. 8, 2004 in No. 03-1500), if this Court concludes that the Foundations Display is unconstitutional, then every governmental display or monument that contains religious symbols or images will be at risk. This is nonsense. The States of Indiana, Alabama, et al. have reduced the endorsement test to a simplistic absurdity in an effort to advocate a bright-line rule that permits the display of virtually *any* religious material. This Court, and reviewing courts throughout the nation, are capable of distinguishing between a display of an intensely sectarian text that plainly endorses religion, such as that in *Stone*, and a monumental sculpture that celebrates historical law-givers, such the one on the East Pediment of the Supreme Court building. Under the endorsement test, this Court can declare the Foundations Display of the Ten Commandments unconstitutional without placing the artwork of the Supreme Court building at any risk.

2. The Foundations Display does not negate the message of religious endorsement that attends the display of the text of the Ten Commandments.

The Petitioners contend that the Foundations Display, viewed as a whole, does not communicate a message of government endorsement of the Ten Commandments. Petitioners correctly state that under the effects prong of the

endorsement test, the display must be evaluated in context and from the viewpoint of the reasonable observer. Brief of Petitioners at 16-17 (citing *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring)). For the Petitioners, apparently, all that matters is that the Ten Commandments is only one document among eleven on display.

The Foundations Display does not provide a context that negates the message of governmental endorsement. On the contrary, that context amplifies the message of endorsement by asserting that our nation is founded on the specific religious precepts in the Ten Commandments. As the Seventh Circuit recognized in *Books v. City of Elkhart*, the association of secular symbols of civil government with the Ten Commandments enhances the message of endorsement. 235 F.3d 292, 307 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) (Stevens, J., statement respecting denial of certiorari) (endorsing reasoning of Seventh Circuit opinion).

The Foundations Display does not merely suggest a link between the Ten Commandments and civil government by placing civic symbols near the Ten Commandments. The introductory document, entitled "The Foundations of American Law and Government Display," expressly asserts that "The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *McCreary County*, 354 F.3d at 443. There could hardly be a clearer message of governmental endorsement: the aptly named Foundations Display valorizes the Ten Commandments as the very foundation of the government itself. This goes well beyond a constitutionally permissible acknowledgement of the

religious sensibilities of the majority; it is a statement that ours is a Christian nation, devoted to, and divinely guided by, the God of the Bible. Others are free to worship or not as they choose, but only those who worship that God alone will see their religious convictions expressed on the walls of government buildings.

CONCLUSION

The FFRF requests that the Court expressly adopt the endorsement test, that it affirm the decision of the Sixth Circuit in the *McCreary County* case, and that it reverse the decision of the Fifth Circuit in the *Van Orden* case.

Respectfully submitted,

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Dated: January 7, 2004

Supreme Court, U.S
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

(11)

No. 03-1693

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES
UNION OF KENTUCKY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS JUDICIAL WATCH, INC.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Judicial Watch, Inc. respectfully submits this brief *amicus curiae* in support of Petitioners McCreary County, Kentucky, Pulaski County, Kentucky and Harlan County, Kentucky. Pursuant to Supreme Court Rule 37.3(a), counsel for the parties have consented to the filing of this amicus brief.[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

Judicial Watch, Inc. is a public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch, Inc. seeks to promote accountability, transparency and integrity in the law and ethics and morality in public life. Since its inception more than ten years ago, Judicial Watch, Inc. has filed hundreds of lawsuits in state and federal courts across the nation in pursuit of these goals. Judicial Watch, Inc. is participating as amicus in this case for two reasons. First, Judicial Watch, Inc. believes this case is an important opportunity for the Court to clarify its Establishment Clause jurisprudence and the *Lemon* test. Second, as a tax-exempt educational organization, Judicial Watch, Inc. has an interest in supporting efforts by government officials to educate the public about the foundation of our laws, which is precisely the goal Petitioners

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[1] Pursuant to Rule 37.6, Judicial Watch, Inc. states that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

purportedly sought to achieve in creating the displays at issue in this lawsuit.

SUMMARY OF THE ARGUMENT

One of the biggest sources of confusion in contemporary constitutional jurisprudence is the Establishment Clause - specifically, the proper relationship between the Establishment Clause and the protection of individual rights. Does the Establishment Clause directly protect individual rights in the same way the Free Expression Clause does? Or does the Establishment Clause protect individual religious expressions indirectly by prohibiting the creation of a national religion and prohibiting discrimination among various religious groups? These questions have become increasingly difficult to answer due to the confusion in Establishment Clause precedent. The lack of any consistent Establishment Clause principles has led to such artificial "tests" as the *Lemon* test, which has only increased the confusion surrounding the application of the Establishment Clause. The *Lemon* test was promulgated as the end-all and be-all of Establishment Clause jurisprudence, but was almost immediately diminished or ignored by this Court. Nonetheless, it has become the standard that the lower courts feel obligated to follow. This case presents the Court with the opportunity not only to clarify the proper application of the Establishment Clause, but also to overrule the *Lemon* test. However, even if the Court determines that a clarification of the Establishment Clause is unnecessary and applies the *Lemon* test to this case, the Circuit Court clearly erred in affirming the permanent injunction entered against Petitioners because none of the displays at issue violate the Establishment Clause.

ARGUMENT

I. The Circuit Court's Erroneous Holding Stems From A Basic Misconception of the Establishment Clause.

Constitutional interpretation generally involves dissecting the actual language and studying the history surrounding the provision being interpreted. *See Waltz v. Tax Commission of New York*, 397 U.S. 664, 681-82 (1970), *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), *Kansas v. Colorado*, 206 U.S. 46, 91 (1907). Only when this information is lacking should the courts engage in other methods of interpretation. With regards to the Establishment Clause, both the language and the history of the clause are readily available and understandable. The Court should not pass up this opportunity to clarify this vital constitutional principle because the current state of Establishment Clause jurisprudence leaves the lower courts and state and federal officials in the position of never knowing how to conform their conduct to the requirements of the Constitution. As a result, officials may refrain completely from any action – even to the detriment of individuals' rights of free expression – for fear of costly litigation. This is exactly what the Religion Clauses were meant to prevent.

A. *Everson* - The Initial Source of Confusion.

The contemporary understanding that the Establishment Clause protects individual rights through the Fourteenth Amendment can be traced to dicta in *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947). In *Everson*, Justice Black, writing for the majority, declared:

> The broad meaning given the [First] Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First [Amendment] applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause.

Id. at 15. And so the misapplication of the Establishment Clause began.

Justice Black, while assured that there was "every reason" to give a broad construction to the Establishment Clause, did not in fact, give *any* reason. *Id.* There is no historical account or legal authority for such a broad interpretation. Instead, the Court developed a laundry list of do's and dont's, and, combined with a reference to Thomas Jefferson's often mis-cited "wall of separation" analogy, created a constitutional aberration.

Unlike the Free Expression Clause, the Establishment Clause, as is plainly apparent from the language and history of the clause, is a federalism clause. Its purpose is not the direct protection of individual rights, like the Free Expression Clause. Rather, the Establishment Clause was intended to "prevent Congress from interfering with state establishments." *Elk Grove Unified School v. Newdow*, 542 U.S. __, 124 S.Ct. 2301, 2330 (2004) (Thomas, J., *concurring*). In *Newdow*, Justice Thomas found that "the Establishment Clause does not purport to protect individual rights," and, incorporating the Establishment Clause into the

panoply of individual rights protected by the First Amendment "prohibit[s] precisely what the Establishment Clause was intended to protect – *state* establishment of religion." *Id.* at 2330-31 (emphasis in original). Justice Thomas summed it up perfectly in *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) by stating that, "while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." It is this relationship that is clearly demonstrated in the "text and history" of the Establishment Clause itself. *See id.*

B. The Text And History of the Establishment Clause Is A Federalism Clause.

According to historical accounts, one of the most vigorous debates during the ratification of the Constitution was the debate surrounding the inclusion of a Bill of Rights, particularly the inclusion of the Religion Clauses. *See Wallace v. Jaffree*, 472 U.S. 38, 92-93 (1985) (Rehnquist, J., *dissenting*). The language proposed by Madison to the House of Representatives during this debate was as follows: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed." *Id.* at 94 (*quoting* 1 Annals of Cong. 424, 434 (1789)). This language was revised several times by a Select Committee to read simply: "'[No] religion shall be established by law, nor shall the equal rights of conscience be infringed.'" *Id.* at 95 (*quoting* 1 Annals of Cong. 729 (1789)). Several

representatives expressed concern over this wording and, in particular, whether it could harm religion in the future. *Id.* at 95-96.

Madison proposed adding the word "national" as a modifier to the word "religion." *Id.* at 96. He thought the addition of the word "national" would "point the amendment directly to the object it was intended to prevent." *Id.* Eventually, Madison withdrew this proposal, and the language that was ratified is the language that is presently in the Bill of Rights: "Congress shall make no law respecting the establishment of religion." U.S. CONST., amend I. However, the debates that preceded adoption of this language made clear that, "the evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly." *Wallace*, 472 U.S. at 99 (Rehnquist, J., *dissenting*).

Evidence of this purpose can be seen in the role religion took in our early Government. The first and most telling example was the enactment of the Northwest Ordinance in 1789. This was a re-enactment of the Northwest Ordinance of 1787, which stated: "[religion], morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at 100. Because the Northwest Ordinance was reenacted during the Bill of Rights' ratification process, "it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial

legislation which conflicted with the intent of the proposals." *Id.*

Also in 1789, House representatives proposed that President George Washington issue a Thanksgiving Day proclamation. *See id.* at 100-102; *see also Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984). Washington subsequently proclaimed November 26, 1789 as a day "to be devoted by the people of these States to the service of that great and glorious Being who is the beneficient author of all the good that was, that is, or that will be...." *Wallace*, 472 U.S. at 102 (Rehnquist, J., *dissenting*). Washington's Proclamation goes on to declare that the day is set apart to "[offer] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions...to promote the knowledge and practice of true religion and virtue...." *Id.*

Washington's Thanksgiving Day Proclamation, rather than unusual, became the norm for U.S. presidents. *Lynch*, 465 U.S. at 675.[2] In addition to issuing proclamations containing an overtly religious message, U.S. presidents also have issued Executive Orders and given inaugural addresses containing religious themes. *See Lynch*, 465 U.S. at 676; *see also Lee v. Weisman*, 505 U.S. 577, 632-35 (1992) (Scalia, J.,

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[2] For example, Presidents John Adams and James Madison also gave similar Thanksgiving Proclamations. *Wallace*, 472 U.S. at 103 (Rehnquist, J., *dissenting*). President Ronald Reagan signed a Joint Congressional Resolution on October 4, 1983 declaring 1983 the "Year of the Bible." *Id.* at 175.

dissenting).[3] The Executive branch is not alone in engaging in religious acts. In addition to the Northwest Ordinance and Joint Resolution regarding Washington's Thanksgiving Proclamation, Congress has issued Acts of Congress and given congressional aid grants containing religious themes and opens its congressional sessions with prayer. *See Lynch*, 465 U.S. at 676, *Wallace*, 472 U.S. at 401-05 (Rehnquist, J., *dissenting*), *Lee*, 505 U.S. at 635 (Scalia, J., *dissenting*).[4] Even the Judicial branch has invoked religion routinely. This Court's sessions open with the invocation "God save the United States and this Honorable Court." *See Lee*, 505 U.S.

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[3] Presidents Thomas Jefferson (despite his "wall of separation of church and state" analogy), James Madison, and George H. Bush all invoked God in their inaugural addresses. *Lee*, 505 U.S. at 633-64 (Scalia, J., *dissenting*). Presidents Abraham Lincoln, Benjamin Harrison, Andrew Jackson, Woodrow Wilson, William McKinley, Harry S. Truman, Dwight D. Eisenhower and Gerald Ford all made religious references in their inaugural addresses. *See* William J. Federer, America's God and Country Encyclopedia of Quotations 227, 236-37, 279, 308, 378, 445, 589, 698 (2000). And our current president, President George W. Bush imbued his first inaugural address with religious themes. *Available at* http://www.freerepublic.com/forum/a3a6a221f3e55.htm.

[4] For example, in 1787, Congress made a grant of land to the Ohio Co. A portion of this land was "for the support of religion." *Wallace*, 472 U.S. at 104 (Rehnquist, J., *dissenting*). On October 3, 1863, an Act of Congress designated an annual National Day of Thanksgiving. *See* William J. Federer, America's God and Country Encyclopedia of Quotations 172 (2000). The Act of June 7, 1897 granted public money for the purpose of supporting sectarian Indian education. *Id.* at 103 (Rehnquist, J., *dissenting*). Additionally, Congress has issued proclamations deeming Christmas and Thanksgiving as National Holidays in religious terms and permitted federal employees to be released from work while still being paid with pubic revenues. *Lynch*, 465 U.S at 676. Congress has also provided for publically funded chaplains for the Senate and House and the military. *Id.*

at 635 (1992) (Scalia, J., *dissenting*). Additionally, the frieze of this Court contains a depiction of the foundations of American law, including an image of Moses carrying the Ten Commandments. *See Lynch*, 465 U.S. at 677. In *Zorach v. Clauson*, 343 U.S. 306, 684 (1952), the Court held that "we are a religious people whose institutions presuppose a Supreme Being."

These examples, in addition to our national motto, our currency, and our Pledge of Allegiance, all demonstrate that there was never meant to be a complete separation of religion and government. Rather, the Establishment Clause was only meant to proscribe actions of a national religion or church.

II. The *Lemon* Test Has Outlived Its Usefulness And the Court Should Expressly Overrule It.

Even if the Establishment Clause is a guarantee of individual rights through the Fourteenth Amendment, the test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) has outlived its usefulness, and the Court should officially overrule it. In *McCreary v. ACLU*, 354 F.3d 438, 445, 463-64 (2003), both the majority and dissenting opinions discuss this Court's reservations about the *Lemon* test. Nonetheless, both the majority and the dissent felt they were obligated to follow *Lemon* until this Court overrules it. *Id.* This is not the first time the Court has been asked to clarify or overrule *Lemon*. In both *Lee v. Weisman* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court opted not to reconsider the *Lemon* test, or its practicability. *Lee*, 505 U.S. at 586-87, *Lamb's Chapel*, 508 U.S. at 395, n. 7. Since that time *Lemon* has become no

clearer. In fact, *McCreary* highlights the difficulties lower courts have had understanding and applying the test.

A. *Lemon's* Background.

The issue before the Court in *Lemon* was the constitutionality of two state statutes. The States of Pennsylvania and Rhode Island had passed very similar statutes authorizing those states to reimburse costs related to the teaching of secular subjects by nonpublic school teachers. *Lemon*, 403 U.S. at 607-10. The Court, led by Chief Justice Burger, held that the statutes violated the Establishment Clause, as "the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Id.* at 625. This historically inaccurate assessment of the constitutional boundaries of religion and government became the *Lemon* test.[5] The test considers whether the offending government action (1) has a secular purpose; (2) does not advance, nor inhibit religion as its primary purpose; and (3) does not foster excessive government entanglement. *Id.* at 612-13. The *Lemon* test has not, however, provided a consistent result when applied to Establishment Clause cases. It has been whittled away and, at times, flatly ignored and even disparaged.

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[5] In addition to failing to consider the historical context of the Establishment Clause, the Court placed a heavy emphasis on the perceived fear of political divisiveness. *Lemon*, 403 U.S. at 622-23. This assumption was unfounded and unfairly fatal to the statutes at issue in *Lemon*.

B. The Whittling Away of *Lemon*.

Just two years after the *Lemon* test was established, it was reduced by the majority in *Hunt v. McNair*, 413 U.S. 734, 741 (1975) to offering only "helpful signposts." Two years following *Hunt*, the majority referred to the *Lemon* test as providing only "guidelines." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). In *Larson v. Valente*, 456 U.S. 228, 252 (1982), the majority found the application of the *Lemon* test "unnecessary." The following year, the majority held that, while the *Lemon* principle was "well-settled," it was "no more than a helpful signpost." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). In *Lynch v. Donnelly*, the majority found the *Lemon* test "useful," but "emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679. In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court did not even use the *Lemon* test in its Establishment Clause query. Perhaps most telling of *Lemon's* incoherent progeny is *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, a case alleging an Establishment Clause violation, the Court, led by the author of *Lemon*, Chief Justice Burger, ignored the three-part *Lemon* test altogether. In a little more than a decade, *Lemon's* very own author abandoned the *Lemon* test.

C. Six of the Current Justices, Including Chief Justice Rehnquist, Have Expressed Concern or Outright Dislike For the *Lemon* Test.

As the *McCreary* dissent points out, six of the current justices of this Court have expressed concern over, or outright dislike for, the *Lemon* test. *McCreary*, 354 F.3d at 464. In addition to the concern expressed in *Committee For Public*

Education and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., *dissenting*), *Wallace v. Jaffree*, 472 U.S. at 110 (Rehnquist, J., *dissenting*), *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Conner, J., *concurring*), *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., *concurring in judgment, dissenting in part*) and *Lee v. Weisman*, 505 U.S. at 644 (Scalia, J., *dissenting*), the Court has expressed similar concerns in other opinions. As mentioned above, in *Lynch*, the majority expressed caution about being confined to any one test. *Lynch*, 465 U.S. at 679. Additionally, in *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., *dissenting*), Justice Scalia rethought his "assumed validity of the *Lemon* 'purpose' test" and adopted Chief Justice Rehnquists's "pessimistic evaluation" in *Wallace*, in which the Chief Justice wrote that *Lemon* "has no basis in the history of the amendment it seeks to interpret, [it] is difficult to apply and yields unprincipled results...." *Aguillard*, 482 U.S. at 636 (Scalia, J., *dissenting*) (*quoting Wallace*, 472 U.S. at 112 (Rehnquist, J., *dissenting*)).

In *Lamb's Chapel*, Justice Thomas joined Justice Scalia's dissent equating the *Lemon* test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles around, after being repeatedly killed and buried...." *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., *dissenting*). Justice Scalia suggests that "the secret of the *Lemon* test's survival...is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to so, but we can command it to return to the tomb at will." *Id.* at 399. The inconsistency in the application of the test – not only in the results the test has yielded but also about whether the test should even be used –

gives added weight to Justice Scalia's "ghoul" analogy. Chief Justice Rehnquist highlighted the absurdity of this inconsistency in his dissent in *Wallace* when he wrote:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show a history class. A State may lend classroom workbooks, but not lend workbooks in which parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing 'services' conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may

enforce attendance at those classes with its truancy laws.

Wallace, 472 U.S. at 110-11 (Rehnquist, J., *dissenting*) (citations omitted).

Lastly, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 319 (2000), Justices Scalia and Thomas joined Chief Justice Rehnquist's dissent and recounted *Lemon's* "checkered career in the decisional law of this Court." The dissent points out that, while the Court previously used *Lemon* as a guideline, the majority in *Santa Fe* applied it strictly, as if there were no question about its appropriateness. *Id.*

As can be seen from this cursory recitation of post-*Lemon* decisions, the usefulness of the three-part *Lemon* test provided in Establishment Clause jurisprudence has been short-lived. The inconsistency and confusion that has resulted demonstrates why the Court should take this opportunity to overrule *Lemon* and give some clarity and consistency to the lower courts and state and federal officials.

III. Even If the Circuit Court Properly Applied the *Lemon* Test, Petitioners' Actions Do Not Violate the Establishment Clause.

Should the Court decide against overruling the *Lemon* test, it nonetheless is clear that Petitioners' displays are constitutional and the Circuit Court erred in affirming the permanent injunction against them.

A. Petitioners' Neutral Purpose Was Clearly Stated.

Lemon's first prong examines the purpose of the legislation or governmental action at issue. *Lynch*, 465 U.S. at 680. That purpose must be secular, but the legislation or government action will be invalidated "only when [the Court] has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Id.* (emphasis added). Therefore, the Court should find a violation of the first prong of the *Lemon* test only if Petitioners' displays were wholly motivated by religious considerations.

Petitioners have made their intent in creating the displays very clear. They articulated five purposes:

> (1) to erect a display containing the Ten Commandments that is constitutional; (2) to demonstrate that the Ten Commandments were part of the foundation of American Law and Government; (3) [to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the Declaration of Independence and foundation of our legal tradition'; (4) to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; and (5) [as stated by the Harlan County School Board] to create a limited public forum on designated walls within the school district for the purpose of posting historical documents.

McCreary, 354 F.3d at 446. Nothing about these five purposes suggests the Petitioners were "wholly motivated by religious considerations" in erecting the displays. Historical accounts of the foundations of our laws and government are quite common, and including the Ten Commandments in such accounts is simply being historically accurate. Only if the Court determines that a stated purpose is a sham should the Court disregard it. *Santa Fe*, 530 U.S. at 308. However, there is no evidence in this case suggesting that Petitioners' stated purposes are not sincere. In *Wallace*, this Court warned against psychoanalyzing legislators and attempting to ascribe "improper motives." *Wallace*, 472 U.S. at 74. As such, the Petitioners' stated purposes should be accepted as sincere and taken at face value – they desired to erect displays containing the Ten Commandments as a *part of* broader displays about the foundations of our laws and government.

B. Petitioners' Displays Do Not Endorse Religion.

The second prong of the *Lemon* test examines whether the primary effect of the legislation or government action is to endorse or inhibit religion. *Lemon*, 403 U.S. at 612. This has also been called the "endorsement test." The primary inquiry is whether, to an objective observer, the legislation or government action could be seen as endorsing religion. *See Santa Fe*, 530 U.S. at 308. This part of the inquiry looks at the both the specific content of the display and the context of the presentation. *See Allegheny*, 492 U.S. at 598.

In this case, the content and context of Petitioners' displays clearly demonstrated that no objective observer could view the displays as governmental endorsements of religion. The school's display contained the following: a copy of the

Ten Commandments, the Star Bangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, and the Preamble to the Kentucky Constitution. *McCreary*, 354 F.3d at 449. The display also included a School Board Resolution which explained the significance of these items and included a provision allowing for other historical materials to be added to the display at the request of any person. *Id.* at 444. The courthouse displays contained all of the documents included in the school's display, with the exception of the explanation, and also contained a depiction of Lady Justice and a one-page document entitled "The Foundations of American Law and Government Display," which briefly explained the role of the Ten Commandments in the formation of Western legal thought. *Id.* at 443. All of the items were the same size, and the displays placed no undue emphasis on any one document. *Id.* at 454.

The Circuit Court erred by assigning too much attention to the Ten Commandments instead of the display as a whole. As stated in *Lynch*, the inquiry is for the display *as a whole*. *See Lynch*, 465 U.S. at 680. Here, the Ten Commandments are only one document in a display that consisted of at least nine separate items. The Ten Commandments are not displayed in a larger-than-life manner, or at a focal point, or with any special identifying markers. Rather, the Ten Commandments are merely one part of an overall unifying theme: the foundations of American law and government. This theme is readily apparent to the objective observer. Despite the Circuit Court's claim to the contrary, there is no lack of "any analytical connection" between the Ten Commandments and the other documents. *McCreary*, 354 F.3d at 460. It is in the nature of all displays that the amount

of information that can be presented to a visitor, student or casual observer must be limited.

Petitioners' displays, including the Ten Commandments, are located in two courthouses and a school – places where our laws are either enforced or studied. Much like the Court's analysis in *Lynch* of a creche in a Christmas display located in a city park during the Christmas season, Petitioners' displays are logically located, contain a number of diverse elements, and demonstrate the historical development of the law. *See Lynch*, 465 U.S. at 679-80.

C. Petitioners' Displays Do Not Incorporate Excessive Government Entanglement.

Neither the district court nor the Circuit Court discussed the entanglement prong of the *Lemon* test because they concluded that Petitioners' displays violated the first two prongs. *McCreary*, 354 F.3d at 461, n. 11. However, in order to complete the *Lemon* inquiry, the third prong will be addressed briefly. The third prong examines whether the statute or government action will foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 613. In *Lemon*, the Court stated that in order to determine whether entanglement was excessive, "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. Examining these factors, it is clear that no excessive entanglement exists in Petitioners' displays. No particular institutions are benefitting from the displays, no aid is being given by the state, and the displays result in no

relationship between the state and any religious authority.[6] Thus the displays pass the third prong of the *Lemon* test as well.

D. Respondents Have Not Been Subjected to Coercion By Petitioners' Displays.

Although not a part of the original *Lemon* test, the Court has occasionally considered "coercion" an element of its Establishment Clause jurisprudence. *See Aguillard*, 482 U.S at 583-84, *Lee*, 505 U.S. at 595, *Santa Fe*, 530 U.S. at 302-04. The Circuit Court considered whether the displays had any coercive effect on viewers in the context of its endorsement analysis. *McCreary*, 354 F.3d at 460-61. Pulling a page from the Court's decision in *Aguillard*, the Circuit Court in *McCreary* held that students, whose attendance at school is required, and individuals who are required to be present at the courthouses for things "ranging from compulsory jury service to bench warrant decrees," would be subject to coercive pressure by Petitioners' displays. *Id.* This is another example of how Establishment Clause jurisprudence has worked an unconstitutional injustice.

In addition to there being no historical context for the use of a "coercion" test under these circumstances, there simply is no coercion in this case. The Court's use of coercion in *Lee*

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[6] The entanglement factors apply more precisely to cases involving public funds aiding nonpublic schools, agencies or organizations. *See Meek v. Pittenger*, 421 U.S. 349 (1975), *Committee For Public Education and Religion. v. Regan*, 444 U.S. 646 (1980), *Mueller v. Allen*, 463 U.S. 388 (1983) and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). This is yet another example of the difficulties of applying the *Lemon* test in a variety of circumstances.

and *Santa Fe* is based on a misapplication of the word itself. As Justice Scalia pointed out in his dissent:

> [C]oercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.

Lee, 505 U.S. at 640-41 (Scalia, J., *dissenting*).

In *Elk Grove*, Justice Thomas concurred with Justice Scalia's assessment of *Lee* and the Court's misapplication of "coercion." *Elk Grove*, 124 S.Ct. at 2330. The daily pledge of allegiance given in the Elk Grove elementary schools did not require participation by the students. *Id.* at 2306. In fact, the school district expressly permitted those students who objected on religious grounds to abstain from reciting the pledge. *Id.* The plaintiff filed suit against the school district claiming that the pledge, containing the words "under God," was a violation of the Establishment Clause. *Id.* Although the Court's opinion rested on principles of standing, Justices O'Conner and Thomas both addressed the coercion test. *Id.* at 2326-27 (O'Conner, J., *concurring*), 2328-29 (Thomas, J., *concurring*). Neither found that the students were being coerced. *Id.* The pledge did not result in any student who opted to abstain from recitation to face any penalties. There was no forced proclamation of allegiance to a religion, faith or God. No one was forced to stand or salute. No one was forced to wear a scarlet letter "H" for heathen. In fact, participation in the pledge was completely free from coercion,

both in the constitutional sense and the everyday use of the word. Justice O'Conner points out, "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles it if did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Elk Grove*, 124 S. Ct. at 2327 (O'Conner, *concurring*).

The alleged coercion in this case is even more chimerical. Unlike the students in *Lee* and *Santa Fe*, who were assembled at official school events where prayer was offered, the students' only exposure to the school's display is by way of walking past it. Exposure to Petitioner's display in general, or the Ten Commandments in particular, can be avoided by simply not looking at the display. The same can be said about the courthouse displays. First, it is important to note that the Court has never considered the occupants of a courthouse to be of a special nature, or especially impressionable. *See e.g. Aguillard*, 482 U.S. at 583-84. Therefore, for the Circuit Court to have utilized the same coercion standard for the courthouse displays as it did for the school's display is incorrect. Second, as with the school display, no one, even those who are required to be at the courthouse, is required to stop and look at the display. The display can be avoided by not looking at it or simply ignoring it.

CONCLUSION

For the foregoing reasons, Judicial Watch, Inc. respectfully urges the Court to clarify its analysis of the Establishment Clause, overturn the *Lemon* test, and reverse the Circuit Court's injunction against Petitioners so as to permit their displays.

Respectfully submitted,

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December 2004

(31)

Supreme Court, U.S.
FILED
JAN 21 2005
OFFICE OF THE CLERK

No. 03-1693

In the Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, et al.,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF LEGAL HISTORIANS AND LAW SCHOLARS ON BEHALF OF RESPONDENTS

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INTEREST OF AMICI

Amici are legal historians, law scholars, and historians of American legal and religious culture who have studied and written in the areas of American and British legal and constitutional history, constitutional law, and religion and the law. We are current and former professors and practitioners who teach or have taught courses in American and British legal history, American and British constitutional history, constitutional law, First Amendment law, religion and the law, religion and politics, seventeenth, eighteenth, and nineteenth century American history, and in related areas in law schools and undergraduate and graduate schools across America. We have authored and edited books and written articles in scholarly journals on related subjects. Many of us are members of the American Society for Legal History, the leading professional association for legal historians.[1]

Amici file this brief in support of the Respondents' challenge to the placement of Ten Commandments displays in the McCreary and Pulaski County courthouses.[2] It is our belief, based on our training and study as legal historians and law scholars, that there is no historical basis of support for Petitioners' claim that the Ten Commandments "played a significant role in the foundation of our system of law and government."

Our names and institutional affiliations (listed for identification purposes only) are contained in Appendix A.

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[1] This brief is filed with the consent of the parties. No counsel for either party to this matter authored this brief in whole or in part and no person or entity, other than amici or their counsel, made a monetary contribution to the preparation of this brief.

[2] As addressed infra at note 7, amici request that the material presented in this brief also be considered in adjudicating *Van Orden v. Perry*, No. 03- 1500, to the extent this material is deemed relevant.

SUMMARY OF ARGUMENT

Petitioners justify their display of the Ten Commandments in the McCreary and Pulaski County courthouses on the ground that the "Ten Commandments have profoundly influenced the formation of Western legal thought" and "provide the moral background of the Declaration of Independence and the foundation of our legal tradition." This claim that the Ten Commandments have "profoundly influenced" America's legal tradition is not supported in historical fact. On the contrary, the historical record reveals that the Ten Commandments had minimal impact on the development of American law. As a result, there is no historical basis for singling out the Ten Commandments as seminal in the foundation of American law.

ARGUMENT

I. THE PETITIONERS' ARGUMENT THAT THE TEN COMMANDMENTS "PLAYED A SIGNIFICANT ROLE IN THE FOUNDATION OF OUR SYSTEM OF LAW AND GOVERNMENT" IS AN ARGUMENT FOR THE PRIMACY OF THE TEN COMMANDMENTS OVER RECOGNIZED LEGAL SOURCES.

It is indisputable that the Ten Commandments originated as, and remain, a religious text.[3] It is equally indisputable that the

[3] *See Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (finding the Ten Commandments to be "undeniably a sacred text"); *Adland v. Russ*, 307 F.3d 471, 480 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000); *Harvey v. Cobb County*, 811 F. Supp. 669, 677-78 (N.D. Ga. 1993), *aff'd mem.*, 15 F.3d 1097 (11th Cir. 1994). As the Seventh Circuit has opined: "[T]he Ten Commandments is a religious and sacred text that transcends secular ethical or moral concerns. . . . [I]ts very text commands the reader to worship only the

precepts contained in some of the Ten Commandments have been inspirational in the development of the Western legal tradition. At the risk of oversimplification, many legal matters rest on notions of right and wrong that, in turn, are normative concepts derived in part from religious texts and teachings.[4] Our normative legal standards also have their origins in *non*-religious sources, such as custom and classical law. And, in some instances, secular laws may "parallel . . . the Ten Commandments," without necessarily having any religious origins. *See Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002). None of these points is controversial.[5]

Lord God, to avoid idolatry, to not use the Lord's name in vain, and to observe the Sabbath. These particular commandments are wholly religious in nature, and serve no conceivable secular function." *O'Bannon*, 259 F.3d at 770-71.

[4] *See School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) ("[M]any of our legal, political and personal values derive historically from religious teachings."). *Accord* Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. LAW & RELIGION 525, 525 (1999-2000) ("Few people, if any, would dispute that the Ten Commandments – and its parallels from other ancient cultures – as well as other directives contained in the Pentateuch of the Hebrew and Christian Scriptures, inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is part.").

[5] As a result, the frieze on the Supreme Court courtroom with its image of Moses among fifteen other lawgivers makes only the vaguest claim of the influence of the Ten Commandments on the Western legal tradition and, unlike the instant controversy, does not convey a message that the Ten Commandments were "profoundly influential" or serve as "the foundation of our legal tradition." *See ACLU v. McCreary County, Kentucky*, 354 F.3d 438, 443 (6th Cir.

The Petitioners' argument that the Ten Commandments represent the "moral background of the Declaration of Independence and the foundation of legal tradition" is not an effort to restate these modest points. *See ACLU v. McCreary County, Kentucky*, 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001). On the contrary, the Petitioners grossly exaggerate the significance of the Ten Commandments in the formation of American law while they assert the primacy of the Ten Commandments over recognized sources of law. In so doing, they have selected a document from one discrete religious tradition to the exclusion of other secular and religious influences with much greater historical pedigrees. *See Adland v. Russ*, 307 F.3d 471, 481-482 (6th Cir. 2002).[6]

The Petitioners' claim of a special relationship between the Ten Commandments and our legal and governmental systems is also conveyed by the original and subsequent compositions of the displays themselves. Initially installing solitary copies of the Ten Commandments in the courthouses, the petitioners later added several legal and historical documents to the displays – first, solely religious excerpts from several "historical" documents, and then entire versions of other legal and historical documents. *See ACLU v. McCreary County, Kentucky*, 354 F.3d 438, 442-443 (6th Cir. 2003). The third (and current) rendition of the displays is entitled "The Foundations of

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2003).

[6] All of the Petitioners' justifications for the displays relate to the Ten Commandments' relationship to the law. *See* 145 F. Supp. 2d at 848. Even if the Petitioners' purpose could be viewed more broadly to include a recognition of America's religious heritage, the placement of a single religious text, surrounded by legal and political texts, does not provide a meaningful account of our nation's diverse religious traditions, particularly where, as the lower courts found, there is no effort to integrate the Ten Commandments with the other documents.

American Law and Government Display." *Id.* Significantly, the Ten Commandments is the only religious document displayed alongside the Magna Carta, the Declaration of Independence, and the Bill of Rights, among other political and legal documents. As the district court found, the positioning of the Ten Commandments with political and legal documents, but not with other religious symbols or moral codes, "imbues it with a national significance constituting endorsement [of religion]." *McCreary*, 145 F. Supp. 2d at 851. A "reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents." *Id.* This positioning thus proclaims the Ten Commandments as the *singular* religious influence in the development of American law.

In essence, the petitioners are not simply claiming that some of the principles contained in the Ten Commandments have influenced ethical notions represented in American civil and criminal law. Rather, they are claiming that the Ten Commandments, as a unique aggregate document, has "*profoundly* influenced the formation" of American legal thought and *singularly* provides the "moral background of the Declaration of Independence and the foundation of legal tradition." *See McCreary*, 354 F.3d at 443 (emphasis added). This historical and legal claim, which we address in the next section, is inconsistent with the historical record.[7]

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[7] The record in *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), is inconclusive on this issue. Apparently, there is an absence of information indicating the original purpose behind the erection of the Ten Commandments monument on the Texas Capitol grounds. *See id.* at 179. However, the Fifth Circuit relied on a rationale similar to that advanced by the Petitioners in *McCreary*, with the court affirming the "influence [of the Ten Commandments] upon the civil and criminal laws of this country." *Id.* at 181. The court went on to

II. THERE IS NO HISTORICAL BASIS FOR SINGLING OUT THE TEN COMMANDMENTS AS SEMINAL IN THE FOUNDATION OF AMERICAN LAW.

The sources of law for the American colonies and later the United States are broad and varied. The principal early sources are the common and statutory law of England, but also influential was the law of the non-common law courts of England, such as equity, chancery, admiralty, orphans, and ecclesiastical courts. Other sources of American law include Roman law, the civil law of continental Europe in the post-Roman period, private international law, and Germanic tribal law.[8]

The various documents and texts that have figured prominently in these developments include, but are certainly not limited to, the Magna Carta, the writings of Sir Edward Coke, the English Bill of Rights, William Blackstone's *Commentaries on the Laws of England*, John Locke's *Second Treatise on Government* and *A Letter Concerning Toleration*, Adam Smith's *The Wealth of Nations*, Baron Montesquieu's *The Spirit of the Laws*, the Mayflower Compact, *Cato's Letters*, the

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state approvingly that the Texas State Preservation Board had "carefully chosen" the Decalogue's location "to reflect the role of the Commandments in the making of law." *Id.* Members of this Court have made similar claims. *See City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, C.J., dissenting from denial of cert.); *Stone*, 449 U.S. at 196 (Rehnquist, J., dissenting). As a result, amici request that the material presented in this brief be considered in adjudicating *Van Orden* to the extent it is deemed relevant.

[8] *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 33-104 (2d ed. 1985); RICHARD B. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW (2d ed. 1974); Michael Hoeflich, *Relationships Among Roman Law, Common Law, and Modern Civil Law: Roman Law in American Legal Culture*, 66 TULANE L. REV. 1723 (1992).

Declaration of Independence, the debates in the Constitutional Convention of 1787, the *Federalist Papers*, the United States Constitution, the Bill of Rights, St. George Tucker's Americanized version of Blackstone's *Commentaries* (Tucker's Blackstone), Joseph Story's *Commentaries on the Constitution*, the writings and speeches of American leaders during the revolutionary and early national periods, and the writings and speeches of abolitionists and Republican leaders from the antebellum period through the end of Reconstruction.

Each of these documents had a far greater influence on America's laws than the Ten Commandments. Indeed, the legal and historical record does not include significant and meaningful references to the Ten Commandments, the Pentateuch, or to biblical law generally. Aside from a failed attempt in the seventeenth century to establish a biblically based legal system in the Puritan colonies, American law is generally viewed as having secular origins.

A. Documents From the Pre-Colonial and Colonial Eras Are Generally Devoid of References to the Ten Commandments.

Most legal historians consider the Magna Carta of 1215 to be a seminal source of modern English, and later American, law.[9] The Magna Carta addressed various legal subjects, including inheritance; land ownership and sale; taxation; jury trials and trial procedure; proportionality in punishment; and the taking of property without compensation. The Magna Carta contains principles that are central to our legal culture today, including assertions that no person can be "seized or imprisoned, or stripped of his rights or possessions . . . except by the lawful judgment of his equals or by the law of the land." The Magna Carta made no reference to either the Ten

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[9] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967).

Commandments as a whole or any particular one of the Commandments. Although it made some references to God, these were formalistic and did not relate to the substantive content of the document.[10]

Colonialists were also influenced by the 1689 English Bill of Rights, which made the monarchy subject to the laws of Parliament and established legal rights and relationships for British citizens (e.g., freedom of speech; excessive bail and fines; cruel and unusual punishment; and the right to a jury trial). Like the Magna Carta, the English Bill of Rights was highly influential in the colonies; many of the colonies incorporated liberties guaranteed by the Magna Carta and the English Bill of Rights directly into their laws and governing documents. Like the Magna Carta, the English Bill of Rights did not mention the Ten Commandments. It made passing references to "God," but these references were again highly formalistic and bore no relationship to the substance of the document.[11]

The concessions granted by King John in the Magna Carta were largely limited to the baronial families at the top of the rigidly structured feudal system. In the early seventeenth century, however, Sir Edward Coke used the Magna Carta to argue for an expansion of rights and liberties to all people in Britain.[12] As a result of Coke's influence, most of the early colonial charters contained a clause asserting that the colonists would have the rights of natural-born English citizens. When

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[10] *See* CONTEXTS OF THE CONSTITUTION 657-666 (Neil H. Cogan ed., 1999).

[11] *Id.* at 686-692.

[12] May 17, 1628, in debate in House of Commons, as quoted in J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689, at 63 (1928, reprint 1960) (citing John Rushworth, 1 HISTORICAL COLLECTIONS 562 (1682)).

American colonists spoke of their "rights as Englishmen," whether in the early colonial period or later at the time of the Revolution, they had in mind, among other things, the rights and privileges found in the Magna Carta and the English Bill of Rights.[13]

Biblical law was also among the myriad influences that shaped early colonial statutory and common law.[14] This influence was characterized by enormous temporal and regional variations. Religious influences were most pronounced in the early New England colonies (Massachusetts Bay, New Haven, Connecticut, and Plymouth), with the influence of biblical law at its apex in the Massachusetts Bay and Plymouth[15] colonies between 1620 and the 1680s.[16]

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[13] Coke also influenced the development of colonial law, and ultimately American law, through his four-volume treatise, *Institutes of the Laws of England*, which was widely read by American lawyers throughout the colonial period. This essentially secular text helped shape American notions of liberty. Although Coke's *Institutes* makes passing references to "God," these are, once again, highly formalistic and hortatory.

[14] BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660, at 4-15 (1983); GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 141-162 (1960); Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

[15] The Mayflower Compact, enacted by the Plymouth Colony in 1620, is often seen as the first act of self-government in the American colonies. This document mentions both "God" and the "Christian Faith," but makes no mention of the Ten Commandments. *See* CONTEXTS OF THE CONSTITUTION 1.

[16] *See generally* THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS (Thomas G. Barnes ed., 1975) (facsimile reprint 1648); *see also* HASKINS,

Even in those colonies, however, reliance on the Ten Commandments themselves (as opposed to reliance on biblical law as a whole) was proportionately insignificant and largely limited to particular criminal and domestic laws, such as blasphemy and adultery.[17] Thus, even though many of the early Puritan leaders believed in the supremacy of biblical law, they relied primarily on other, secular sources – including local innovation – for the bulk of their laws.[18]

Furthermore, these colonies' reliance on biblical principles was relatively short-lived. The Glorious Revolution of 1688-89 brought about a new charter in Massachusetts Bay, ending the "experiment" of this most-religious-of-all-the-colonies. The new charter removed almost all references to biblical law and replaced them with common law practices and procedures. Although Massachusetts law still retained a few remnants of biblical law after 1691, the laws of the colony in this period, and later the state, were essentially secular, based primarily on English law, indigenous law, and local custom.[19]

LAW AND AUTHORITY 136-37.

[17] *See* HASKINS, LAW AND AUTHORITY 136-37. It cannot be said that the English settlers of the New World would not have enacted these statutes absent the Ten Commandments. Laws punishing theft, murder, and perjury are found in virtually every culture, and were deeply ingrained in the laws of pre-Christian England as well as in the English common law.

[18] Another influential text was Michael Dalton's *The Countrey Justice* (1618, reprint 1973), a popular – and secular – handbook for British justices of the peace. *See* HASKINS, LAW AND AUTHORITY 137.

[19] RUSSELL K. OSGOOD, THE HISTORY OF THE LAW IN MASSACHUSETTS 10-13 (1992); MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 62-64.

Reliance on biblical principles was even less pronounced in the non-Puritan colonies. In Virginia, the oldest and most important of the British colonies, an attempt to base a system on the Decalogue ended early with the colony quickly resorting to common law.[20] A review of Virginia's colonial laws demonstrates that only a small subset of the colony's legislative enactments (e.g., Sabbath laws) can be said to parallel the Ten Commandments. Even then, nothing in the colonial record indicates that the colonialists viewed the law as being based on the Bible or the Ten Commandments.[21] A secular common law was also applied in Pennsylvania and New York, despite the latter colony initially relying on Massachusetts Bay's *Lawes and Libertyes* as a model.[22]

The clearest contrast from the Puritan colonies is seen in Rhode Island, where its founder, Roger Williams – who had been exiled from Massachusetts Bay in part because of his refusal to accept the religious aspects of its legal culture – expressly rejected arguments that Mosaic law should serve as a model for civil law, relying instead on secular English law for authority.[23]

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[20] *See* Perry Miller, *Religion and Society in the Early Literature of Virginia*, *in* ERRAND INTO THE WILDERNESS 99-140 (1956); CHAPIN, CRIMINAL JUSTICE 4-15; ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 3-38 (1930).

[21] *See* sources in note 20, supra.

[22] *See* JOHN WEBB PRATT, RELIGION, POLITICS AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 29-37 (1967); J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 15-18 (1990).

[23] To Williams and his followers, Christ's resurrection had abrogated the authority of the first four commandments (the "first table") and had restricted the precedent of Mosaic law to Old Testament Israel. *See* EDMUND S. MORGAN, ROGER WILLIAMS: THE

Furthermore, throughout the colonies, significant differences existed between legislative enactments and the mandates of the Ten Commandments over matters such as divorce, pre-marital sex, slavery, and inheritance. For example, the Bible provides that the first-born son should receive a "double portion" of inheritance (*Deuteronomy* 21:16). Massachusetts Bay adopted this provision in the seventeenth century, but the rest of the colonies rejected it, and instead accepted the English rules of primogeniture. Also, under biblical law, the wife could not inherit from her husband; rather, the brother inherited by marrying the wife. (*Deuteronomy* 25:5 and following). In all of the colonies, however, wives inherited outright or at least were entitled to their dower rights.[24]

In sum, the vast majority of the colonial codes, and the English sources from which they were principally derived, developed independently of the Ten Commandments.[25] Only a small fraction of colonial laws (e.g., Puritan codes) were derived from the Bible generally, and an even smaller subset

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CHURCH AND THE STATE 102-104, 128 (1967); EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 66-68, 80-85 (1991); CHAPIN, CRIMINAL JUSTICE 4-15.

[24] *See* Paul Finkelman, *The Ten Commandments on the Courthouse and Elsewhere*, __ FORDHAM. L. REV. __ (2005).

[25] As a result, Petitioners' claim (*see* Pet. Br. at 22) that "Twelve of the thirteen original colonies adopted the entire Decalogue into their civil and criminal laws" is flatly incorrect. *See* Zechariah Chafee, Jr., *Colonial Courts and the Common Law*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 72-73 (D. Flaherty ed., 1969) ("[T]he view that colonial law was either rude or drawn from the Bible is dispelled by a study of court records, at least after the earliest periods of settlement.").

paralleled the Ten Commandments specifically.[26] Even then, reliance on biblical sources all but disappeared following the Glorious Revolution. Indeed, much of what became the central legal rights of the United States – due process of law; the right to confront witnesses; the right against self-incrimination; prohibitions on cruel and unusual punishments; freedom of speech; and, most of all, freedom of religion – may properly be seen as a *reaction* to the legal culture of the Puritan colonies, rather than as an endorsement thereof.

B. Religious Influences Further Declined During the Founding Era.

The most important source of the founding generation's attitudes toward law and government was the common law as brought over from Great Britain and adapted to meet America's indigenous needs.[27] During the eighteenth century, a developing market economy, dependent on trade with England and between the colonies, required a more formalized legal system with consistent procedural and substantive rules based on British common law.[28] Increasing religious heterogeneity in

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[26] *See* George E. Woodbine, *The Suffolk County Court, 1671-1680*, *in* ESSAYS 202 ("The presence of biblicism and Scriptural law is very little in evidence in [early colonial] records. Much has been written on the effect of the Mosaic law upon the legal situation in the New England colonies. Undoubtedly the influence of that law as a active legal force in their civilization has been greatly overstated.").

[27] BAILYN, IDEOLOGICAL ORIGINS 22-54; FRIEDMAN, HISTORY OF AMERICAN LAW 34-35.

[28] KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 22-23 (1989); MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 62-64; FRIEDMAN, HISTORY OF AMERICAN LAW 48-49, 80.

the colonies in the 1700s further militated against reliance on biblical law.[29]

Rather than seeing the law as biblically based, the founding generation viewed the common law as a repository of human experience, embodying concepts of justice, equity, and the rule of law, not as representing divine principles. American revolutionaries cited the Magna Carta, Coke's *Institutes*, William Blackstone's *Commentaries on the Laws of England*, and other English legal sources in their struggle against the Crown and Parliament. Blackstone's *Commentaries*, written between 1765-1769 and considered the dominant lawbook in England and America for more than half a century after its publication, does not include a single reference to the "Decalogue" or the "Ten Commandments."[30] While Blackstone understood that canon law had influenced the development of British law (via the established Church of England) and made formalistic references to "God" and religion in his *Commentaries*, the system of law he described was secular and non-biblical. Throughout the *Commentaries*, Blackstone's discussion of property law, criminal law, marital law,

[29] In 1684, the Governor of the colony of New York, Thomas Dongan, reported to his superiors in London that: "Here bee not many of the Church of England; [a] few Roman Catholicks; abundance of Quakers preachers men and women especially; Singing Quakers, Ranting Quakers; Sabbatarians; Antisabbatarians; Some Anabaptists; some Independents; some Jews; in short of all opinions there are some, and the most part none at all." "Governor Dongan's Report on the State of the Province," 2 ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK 879-90 (1901).

[30] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Charles Harr ed., 1962). Blackstone's *Commentaries* were more popular in America than in England. *See* FRIEDMAN, HISTORY OF AMERICAN LAW 102.

inheritance law, and the rights of persons has little or nothing to do with, and is often at odds with, biblical law.[31]

The founding generation was also heavily influenced by the works of Enlightenment thinkers, principally John Locke's *Second Treatise on Government* (1690) and Baron Montesquieu's *Spirit of the Laws* (1748). The works of the radical whig philosophers, like John Trenchard and Thomas Gordon, the authors of *Cato's Letters* (1720-1723), were also influential. Trenchard and Gordon were strong advocates of freedom of expression and government accountability, and spoke out against corruption in the government and the Anglican Church. The founding generation also read and applied the writings of the Scottish Enlightenment, including those of Adam Smith, David Hume, and Francis Hutchinson.[32]

Locke's political writings refuted the doctrine of the divine and absolute right of Kings and established a theory of a "social contract" by which people – the ultimate sources of authority – delegated to government the responsibility to create an ordered society.[33] Locke's theories stand in sharp contrast to the notion of a government based on the concept that God is the lawgiver

[31] Blackstone wrote that there was a great body of law, termed municipal law, that derived its authority not from God, but from the "law of man." "There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficiency . . . ." COMMENTARIES, 4:42.

[32] *See* BAILYN, IDEOLOGICAL ORIGINS 35-54; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 291-305 (1969).

[33] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 408-412 (1965); HALL, MAGIC MIRROR 57-58.

and that secular law is subject to religious mandates. In his influential *A Letter Concerning Toleration*, Locke wrote that "the law of Moses," which includes the Ten Commandments, "in no way obligates Christians." "The business of law," he noted, was not to protect religious beliefs or "to provide for the truth of opinion," but rather to provide for "the security and safety of the commonwealth and each man's goods and person."[34]

Only slightly less influential among the founding generation was Montesquieu's *Spirit of the Laws*, which, among other matters, advocated separation of powers, toleration in religious belief, and freedom of worship.[35] Although Montesquieu addressed at length the relationship between government and religion, he did so without any emphasis on the Ten Commandments.

All of these sources were widely read by the Founding Fathers and are generally considered by historians and other scholars to be ideologically central to the founding of the nation. These writings were highly influential on the legal and political documents of the founding era, including the Declaration of Independence, the United States Constitution, and the American Bill of Rights.[36] To be sure, The Declaration of Independence includes prefatory references to the "Laws of Nature and of Nature's God" and a "Creator," but these are not acknowledgments of a law-giving biblical God.[37] On the

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[34] JOHN LOCKE, A LETTER CONCERNING TOLERATION 115-17, 123 (Raymond Klibansky ed. 1968).

[35] BAILYN, IDEOLOGICAL ORIGINS 27-29; WOOD, CREATION OF THE AMERICAN REPUBLIC 152-153.

[36] *See* BAILYN, IDEOLOGICAL ORIGINS 22-54.

[37] *See* ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE 26-30 (2002) ("It is the God of [Jefferson's] heterodoxy that appears

contrary, Jefferson and the Enlightenment writers on which he relied distinguished natural law from Old Testament law.[38] Equally important, Jefferson appealed to notions of popular sovereignty and self-determination in the Declaration. In asserting the right of the colonists to create their own nation he did not invoke God's name or even "nature's God" as justification. He did not claim that the new nation was formed on the basis of biblical law.[39] Rather, he asserted that

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in the Declaration of Independence rather than the God of the Bible."); *id.* at 19. *See also* CARL BECKER, THE DECLARATION OF INDEPENDENCE 24-78 (1958). *Accord* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION 355 (1994) ("The idea of 'the laws of nature and of nature's God' is derived from classical political philosophy.").

[38] There is no evidence Jefferson or the other members of the drafting committee relied on any biblical sources in considering the language of the Declaration. In a subsequent letter to Richard Henry Lee, Jefferson wrote that the Declaration was "neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to give expression of the American mind. . . . All its authority rests on harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc." Jefferson to Lee, May 8, 1825, 10 THE WRITINGS OF THOMAS JEFFERSON 343 (Paul L. Ford ed., 1899).

[39] To be sure, Jefferson and the drafters consciously employed language that placed the Declaration within both an Enlightenment and theistic framework. According to Professor Davis, "most of the natural law doctrines could be viewed in tandem with traditional Christianity. * * * [The Declaration] is written in a theistic framework primarily because Jefferson, his committee, and indeed the Continental Congress at-large understood the colonists' authority to sever their relationship with Britain as resting upon a theistic, natural rights philosophy. Yet this theistic framework also was

"Governments are instituted among Men, deriving their just Powers from the Consent of the Governed," words that became the scripture for American democracy.[40] In essence, by relying on Enlightenment natural law, Jefferson was rejecting the primacy of revealed or divine law in the foundation of the new government.[41] Thus in no substantive way does the Declaration pertain to biblical law or the Ten Commandments, and, in fact, its references to natural law indicate a *rejection* of any such connection.[42]

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adopted because it was broad and general enough to capture the theistic framework in which most colonists understood all earthly events to take place. Thus it was neither specifically deistic (scientific worldview) nor Christian (biblical worldview), as either position would have excluded those adherents of the other." DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774-1789: CONTRIBUTIONS TO ORIGINAL INTENT 108-109 (2000).

[40] *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 132-142 (1997).

[41] *See* JAYNE, JEFFERSON'S DECLARATION 38 ("[The first paragraph of the Declaration] does not refer to the God of revelation or the Bible but to 'Nature's God,' or [Lord] Bolingbroke's deistic God of natural religion. The impartiality of this God to all nations and peoples can be seen in Jefferson's reference to 'one People,' the colonists, who were under the 'Laws of Nature.' According to these 'Laws' and 'Nature's God' who established them, a people or a nation was not chosen by God over other peoples and nations on earth. Rather they were all given a 'separate and equal Station' by those 'Laws of Nature' and 'Nature's God.' *Jefferson's God of the Declaration is, therefore, antithetical to any God who would manifest partiality by choosing one people or nation over others, as did the God of the Old Testament.*") (emphasis added).

[42] *See* CORNELIA GEER LE BOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW 110 (1950) ("[T]he Founding Fathers, as they employed the notion of natural law . . . gave it very often a utilitarian

Jefferson, for one, doubted the authenticity and authority of the Ten Commandments. In a later letter to John Adams, Jefferson wrote that "the whole history of [the Ten Commandments] is so defective and doubtful that it seems vain to attempt minute enquiry into it; and such tricks have been plaid with their text . . . that we have a right, from that cause, to entertain much doubt what parts of them are genuine."[43] In the same letter, Jefferson went on to refute the claim that Christianity served as a basis of the common law.[44] Adams' response was supportive, writing that Jefferson's research "in the laws of England, establishing Christianity as the Law of the Land and part of our common Law, are curious and very important. . . . In what sense and to what extent the Bible is Law, may give rise to as many doubts and quarrels as any of our civil political military or maritime Laws and will intermix with them all to irritate Factions of every sort."[45] Although Jefferson's religious views were not shared by all of his contemporaries, his expression of the philosophical bases of the new nation, as represented in the Declaration of Independence, was universally embraced.[46]

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meaning. Such a utilitarian meaning is logically in opposition to the transcendental meaning which relates to man's rational nature: it supplies a contrary premise.").

[43] Jefferson to Adams, Jan. 24, 1814, THE ADAMS-JEFFERSON LETTERS 421 (Lester J. Cappon ed., 1959).

[44] *Id.* at 422-423.

[45] Adams to Jefferson, March 3, 1814, *in id.* at 427.

[46] *See* MAIER, AMERICAN SCRIPTURE 135 ("By the time of the Revolution [Enlightenment and Whig] ideas had become, in the generalized form captured by Jefferson, a political orthodoxy whose basic principles colonists could pick up from sermons or newspapers or even schoolbooks without ever reading a systematic work of

The central legal documents of the United States – the Constitution and the Bill of Rights – did not include even a perfunctory or formalistic reference to God. Rather than relying on divine authority, the Constitution is "ordained" by "the People of the United States." The foundation of the law of the United States thus emanates from the nature of representative government – what Jefferson called "the consent of the governed" – and needs no external or divine authority for its support.[47]

Thus, it comes as no surprise that the Ten Commandments and biblical law received nary a mention in the debates and publications surrounding the founding documents. In the wide-ranging debates – reprinted in Madison's *Notes*, the *Annals of Congress*, Farrand's *Records*, Elliot's *Debates*, and elsewhere – the Founders mentioned Roman law, European Continental law, British law, and various other legal systems, but as can best be determined, no delegate ever mentioned the Ten Commandments or the Bible. The only serious discussion of religion led to the clause prohibiting religious tests for office-holding.[48]

Indeed, many of the framers made statements during the debates expressing the view that religion should be left to the

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political theory. *The sentiments Jefferson eloquently expressed were, in short, absolutely conventional among Americans of his time.*") (emphasis added). *Accord* DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 102 ("There is every reason to believe that Jefferson strongly held to natural law theory as the essence of the universal order established by God and that most of the delegates also saw it that way.").

[47] *See generally* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION 26-45 (1996).

[48] *See generally* THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987).

private sphere. James Madison noted in one debate that "Religion itself may become a motive to persecution & oppression. – These observations are verified by the Histories of every Country ancient & modern."[49] South Carolina's Charles Pinckney described "our true situation" as this: "a new extensive Country containing within itself the materials for forming a Government capable of extending to its citizens all the blessings of civil & religious liberty – capable of making them happy at home."[50] Similarly, George Reid of Delaware declared, in a debate over the power of Congress, that "the Legislature ought not to be too much shackled. It would make the Constitution like Religious Creeds, embarrassing to those bound to conform to them & more likely to produce dissatisfaction and Scism, than harmony and union."[51] This illustrates how the framers believed that minimizing the connection between religious law and civil law was integral to American liberty.

Similarly, neither the "Bible" nor "Scripture" nor the "Ten Commandments" appears in the index of the *Federalist Papers*, which are generally considered to contain the most important discussions of the meaning of the United States Constitution at the time of ratification.[52] The authors of the *Federalist Papers* made a handful of passing references to "God" and "gods," the

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[49] MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135 (1966).

[50] *Id.* at 402.

[51] *Id.* at 582.

[52] *See generally* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

"Almighty," "Heaven," and to religion (ancient and modern)[53] in one place (*Federalist 43*), Madison refers to "the transcendent law of nature and of nature's God," but this reference is suggestive of the deist views of Jefferson, rather than of an Old Testament God.[54] Rather than asserting a connection between biblical law and the new nation, most references to religion in the *Federalist Papers* denounce religious factions and intolerance and the mixing of church and state.[55]

To be sure, a handful of later legal commentators made vague claims that, on face value, support the Petitioners' claims about the relationship between the Ten Commandments and the law. For example, Joseph Story, extremely influential among early American lawyers through his numerous legal treatises, including his *Commentaries on the Constitution*, wrote an article in 1836 on "natural law" in which he referred to God as "our Lawgiver and Judge, [to whom] we owe an unreserved obedience to his commands."[56] However, this assertion was inspirational; it did not suggest a belief on the part of Justice Story that the law was derived from God's Commandments. In

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[53] *See, e.g., Federalist 38*: "It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution." *Id.* at 230-231.

[54] According to Le Boutillier, Madison's phrasing in *Federalist* 43 "strips away its transcendental qualities as he says that it 'declared that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.' This is utilitarianism." LE BOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW 113.

[55] *See Federalists* 1, 10, 19, 31, and 51.

[56] JOSEPH STORY, *Natural Law, in* Encyclopedia Americana 9:150-158 (Francis Lieber ed., rev. ed. 1836).

his treatment of the history of the Revolution, the history of the adoption of the Constitution, and his lengthy commentary on the provisions of the Constitution, which made up the vast bulk of his three-volume *Commentaries*, he placed no emphasis on religious influences.[57] Story never mentioned the Ten Commandments in his treatise, while his single mention of the Bible came in a discussion of Freedom of the Press (§ 1875) with him merely noting that some governments have regulated the printing of the Bible and its translation.

Also, in his widely read *A Course of Legal Study* (1836), University of Maryland professor David Hoffman wrote that "[t]he purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every christian nation."[58] Although Hoffman maintained the law had a philosophical debt to the Bible, referring to the biblical books of Leviticus, Numbers, and Deuteronomy as containing the "ritual, moral, and civil law of the Jews," he, like Story, stopped short of claiming that Anglo-American law was derived from the Decalogue or Pentateuch. In fact, Hoffman cautioned his readers against drawing parallels between scripture and the law, noting that the Bible's "figurative [and] symbolic language" presented a "most serious impediment" to applying biblical principles to the law.[59] Even then, these references – which support the Petitioners' claims in only the vaguest sense – are the exception to the general understanding that the law was derived from secular sources.

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[57] *See generally* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

[58] DAVID HOFFMAN, A COURSE OF LEGAL STUDY 1:65-78 (1836).

[59] HOFFMAN, A COURSE OF LEGAL STUDY 66, 68, 71-72, 74-75.

C. Early American Common Law Reflects No Significant Reliance on the Ten Commandments.

In addition to the lack of references to the Ten Commandments in the founding documents, there also is no significant reliance on the Commandments in early American case law. Granted, in a handful of early nineteenth century cases judges drew parallels to the fourth commandment when validating the enforcement of Sunday laws.[60] In a few other cases, judges made rhetorical references to the Decalogue when interpreting rules governing labor or judicial activity on Sundays.[61] For the most part, however, early judicial references to the Ten Commandments were not detailed, with most allusions being illustrative or oratorical, and with the courts not relying on the Decalogue as authority for their holdings.[62] Rather, the courts upheld the laws as valid health and labor regulations.[63] In essence, the biblical references were hortatory, with the holdings resting on secular legal grounds.[64]

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[60] *See, e.g., New York v. Hoym*, 20 How. Prac. 76, 78-79 (N.Y. Super. 1860); *City Council v. Benjamin*, 2 Strob. 508, 523 (S.C. 1845); *Pennsylvania v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817).

[61] *See, e.g., Fox v. Abel*, 2 Conn. 541, 554 (1818).

[62] *See, e.g., Neal v. Crew*, 12 Ga. 93, 100 (1852); *New York v. Hoym*, 20 How. Prac. 76 (N.Y. Super. 1860); *Kountz v. Price*, 40 Miss. 341 (1866); *Theisen v. McDavid*, 16 So. 321 (Fla. 1894); *Rosenbaum v. Arkansas*, 199 S.W. 388 (Ark. 1917).

[63] *See, e.g., Ex parte Andrews*, 18 Cal. 678 (1861); *Melvin v. Easley*, 52 N.C. 356 (1860); *McGatrick v. Wason*, 4 Ohio St. 566 (1855); *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. 401 (1867); *North Carolina v. Brooksbank*, 28 N.C. 73 (1845); *North Carolina v. Williams*, 26 N.C. 400 (1844); *Specth v. Pennsylvania*, 8 Pa. 312 (1840).

[64] *See* Green, *Fount of Everything Just and Right*, at 555.

For example, in one early case, *Pearce v. Atwood*, 13 Mass. 324 (1816), the Massachusetts Supreme Judicial Court upheld a Sunday law as based on "common practices."[65] Referring to the fourth commandment, the court noted that "it may be inferred, that one day in seven was, according to divine will, to be set apart as a day of rest from labor." But, the court continued, "it is not necessary to resort to the laws promulgated by Moses, in order to prove that the Christian Sabbath ought to be observed by Christians, as a day of holy rest and religious worship."[66] The court viewed its authority as arising from the "uniform usage" among the Christian citizens of the state, not from any religious basis for the law.

Furthermore, court decisions pertaining to the Sabbath and the other subject matter addressed in the Ten Commandments represent a small subset of the areas of decisional law; the vast majority of court decisions – both from the early American period and today – make no mention whatsoever of the Commandments or biblical law.[67]

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[65] 13 Mass. at 345-46.

[66] *Id.* Noting that "some among our ancestors so far regarded the laws of Moses as of perpetual obligation," the Court held that none of the "rigid laws of Moses" held sway in the Commonwealth. *Id.* at 346.

[67] Petitioners and their amici rely on several nineteenth and early twentieth century cases where judges declared a connection between the Ten Commandments and the law. *See* Pet. Br. at 25-29; Br. Amicus Curiae of Wallbuilders, Inc., *passim*. First, as discussed, the vast majority of those references were hortatory with no examination of the historical record. But, more important, the uninformed statement of a judge does not establish an historical fact.

D. Contemporary Statutory and Common Law Reflects Little Religious Influence of the Ten Commandments.

The developments that have taken place in the past century have further diluted any religious influences on the law, such that the vast majority of contemporary statutory and common law reflects no religious influence. *Accord McGowan v. Maryland*, 366 U.S. 420, 433-36 (1961) (documenting the growing secularization of Sunday laws beginning in the eighteenth century). The areas of contemporary law that developed independently of the Ten Commandments include the law of corporations and business transactions; riparian law; immigration law; tax law; environmental law; Native American law; international human rights law; international business law; antitrust law; administrative law; bankruptcy; intellectual property law; civil rights law; estate planning and probate; women's rights law; education law; licensing and regulation of professions; dram shop laws and liquor regulation; insurance law; traffic law; science and computer technology law; regulations regarding nudity and obscenity; criminal procedure, including the rights to a jury trial and against self-incrimination; and criminal statutes prohibiting vagrancy, statutory rape, assault and battery, arson and property destruction, underage drinking, use of narcotics, and kidnaping.[68] Indeed, it is difficult to find any aspect of contemporary American law that can be fully and directly traced to the Ten Commandments.

[68] *See generally* FRIEDMAN, HISTORY OF AMERICAN LAW; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICA LAW, 1780-1860 (1977) (describing the transformation of American law from relying on natural law concepts to adopting an instrumental approach).

III. EVEN IF SOME OF THE PRECEPTS REPRESENTED IN THE TEN COMMANDMENTS HAVE INFLUENCED AMERICAN LAW, THE TEN COMMANDMENTS AS AN AGGREGATE DOCUMENT LACKS A SIMILAR STATUS.

Although the precepts found in some of the individual commandments may find parallels in Anglo-American law (e.g., homicide, theft, false witness), the first "table" or section of the Ten Commandments concerns purely religious duties – worshipping God, avoiding idolatry, not using God's name in vain, and observing the Sabbath – that have no parallels in civil law. *See Stone*, 449 U.S. at 41-42.[69]

But more important, even if some individual commandments could have an indirect connection to modern legal precepts, their presentation as an aggregate unit – in this case, a highly recognizable unit with indisputable religious significance – mutes any secular aspects of those individual commandments. In essence, the *Ten Commandments* is an aggregate religious document. In that form, the commandments are from God, not from some secular authority. The fact that a secular authority could also mandate fealty to the precepts contained in a handful of individual commandments does not make their presentation as part of the Ten Commandments non-religious. Conversely, the fact that some of the individual commandments may parallel secular legal precepts does not mean that the Ten Commandments, as an aggregate religious

[69] "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See Exodus* 20:12-17; *Deuteronomy* 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See Exodus* 20:1-11; *Deuteronomy* 5:6-15." 449 U.S. at 41-42.

document, "profoundly influenced the formation of Western legal thought" and served as "the foundation of our legal tradition." The historical record, as discussed above, demonstrates otherwise.

CONCLUSION

While the Ten Commandments have influenced some of our notions of right and wrong, a wide variety of other documents have played a more dominant and central role in the development of American law. No scholar who has seriously studied this issue would assert that the Ten Commandments has played a dominant or major role, or even a significant role, in the development of American law as a whole. To insist on a closer relationship or to claim the that Ten Commandments has a special place in the development of American law lacks historical support.

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January 2005

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(7)

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 03-1693

In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF MINNESOTA, MISSOURI, ILLINOIS, IOWA, NEW MEXICO, OKLAHOMA, AND WISCONSIN *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* STATES

This case concerns the constitutionality under the Establishment Clause of a depiction of the Ten Commandments at a courthouse as part of a display of other historical documents that symbolize the development of law. The State of Minnesota has an interest in the resolution of this issue because the courtroom of the Minnesota Supreme Court in the Minnesota State Capitol includes a depiction of the Ten Commandments in a group of murals that symbolize concepts of the legal system. The State of Missouri has an interest because there are courthouses in Missouri displaying similar symbols. The States of Illinois, Iowa, New Mexico, Oklahoma, and Wisconsin have a like interest. Affirming the decision of the Sixth Circuit Court of Appeals could call into question the constitutionality of Minnesota's display of courtroom murals, and similar displays in Missouri, as it could for other such displays that include depictions of the Ten Commandments at numerous courthouses across the country.

SUMMARY OF ARGUMENT

A depiction of the Ten Commandments in a courthouse setting does not violate the Establishment Clause when it is part of a display of other historical symbols of the legal system. Such a display does not violate the Establishment Clause because it satisfies each of the three prongs of the prevailing test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). There is a secular purpose for such a display; a reasonable observer would not understand such a display to be a government endorsement of the religious aspect of the Ten Commandments; and such a display does not foster excessive

governmental entanglement with religion. The contrary decision of the Sixth Circuit rests on a misapplication of this Court's precedents under the *Lemon* test. The Court should reject the Sixth Circuit's faulty reasoning and remove the doubt it creates for the continuation of displays such as that in the courtroom of the Minnesota Supreme Court.

ARGUMENT

I. A Depiction Of The Ten Commandments In A Courthouse Setting In Conjunction With Other Historical Symbols Of The Legal System Does Not Violate The Establishment Clause Under The *Lemon* Test.

This case requires the Court to determine whether including a depiction of the Ten Commandments in a courthouse display of historical symbols of law violates the Establishment Clause. Like many other courthouses throughout the country, the courtroom of the Minnesota Supreme Court in the Minnesota State Capitol building includes a depiction of the Ten Commandments. The building, designed by architect Cass Gilbert who also designed the United States Supreme Court building, was opened to the public in 1905. *Minnesota State Capitol, Self-guided Tour*, produced by Minnesota Historical Society, available at *http://www.mnhs.org/statecapitol*. On the walls of the courtroom of the Minnesota Supreme Court, located in the east wing of the second floor, are large mural paintings by John LaFarge that "symbolize concepts of the legal system." *Id.* The paintings are described as follows by the Court Information Office of the Minnesota Supreme Court:

> Toward the ceiling of the chambers are four paintings by artist John LaFarge, each one symbolizing a concept of the legal system. Above the justices' bench is pictured Moses receiving the law of the Ten Commandments. It is called "The Moral and the Divine Law." The painting to the left is called "The Recording of Precedents" and shows the Chinese philosopher Confucius and his documenting of canons and charges in the course of Chinese history. The Greek philosopher Socrates can be seen above the entrance as he uses his Socratic method of questioning to elicit answers from his pupils, the same technique often used by the justices in asking questions of the attorneys before them. The painting is called "The Relation of the Individual to the State." The painting on the right side is called "The Adjustment of Conflicting Interests," and shows medieval lords meeting with church representatives in an attempt to resolve their differences peacefully, a function that later became the role of the courts.

Minnesota Supreme Court, at pp. 12-13, produced by Court Information Office, available at *http://www.courts.state.mn.us/page/?pageID=149*.

Courthouses in Missouri display similar symbols. For example, the lobby of the courthouse for the Missouri Court of Appeals, Western District, in Kansas City, built in 1982, contains a large ornamental frieze. One element is an image of stone tablets without any writing. Similar unmarked tablets appear on the other side of the state, above the exterior doors of the Civil Courts Building for the City of St. Louis. The building, constructed in 1930, also has unmarked tablets above the doors to two courtrooms on each floor, and tablets in the lobby that are

marked with Roman numerals I through X – an obvious reference to the Ten Commandments. Elsewhere in the building are other images, such as the roof decoration: two 12-foot-high griffins, with human faces that symbolize human mercy tempering justice.

The governing test under the Establishment Clause for the constitutionality of such displays, like the LaFarge courtroom murals at the Minnesota State Capitol, remains the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The test has not been abandoned. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying *Lemon* test); *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 n.7 (1993) (noting that *Lemon* has not been overruled).

Under the *Lemon* test, a challenged governmental action violates the Establishment Clause if: (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it fosters excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13.

The decision of the Sixth Circuit Court of Appeals in this case employs reasoning that misapplies this Court's decisions under the *Lemon* test. A courthouse display that includes a depiction of the Ten Commandments with other historical symbols of law does not violate the Establishment Clause under a proper application of the *Lemon* test. Thus, to decide this case, the Court need not overrule its precedents or formulate a new Establishment Clause test that provides for a different or less exacting review.

A. A Courthouse Display Of Historical Legal Symbols That Includes The Ten Commandments Does Not Lack A Secular Purpose.

The court of appeals erred in holding that a courthouse display that includes the Ten Commandments fails the first prong of the *Lemon* test if the display lacks information demonstrating an "analytical or historical connection" between the Ten Commandments and the other legal documents or symbols of law in the display. *ACLU v. McCreary County*, 354 F.3d 438, 451 (6th Cir. 2003). This holding misapplies the Court's precedents and, in so doing, wrongly casts doubt on the constitutionality of the many other courthouse displays that include the Ten Commandments, such as the LaFarge murals in the courtroom at the Minnesota State Capitol building.

The first prong of the *Lemon* test sets a fairly low hurdle. *See Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). It requires only that at least one secular purpose exist for the challenged governmental action. *See id.* at 681 & n.6. The Court accords deference to the government's asserted secular purpose and, accordingly, will find that the challenged governmental action fails the *Lemon* test's first prong only if the asserted secular purpose is a sham. *See Santa Fe*, 530 U.S. at 308-09, 314-17; *see also Lynch*, 465 U.S. at 680 (stating that, under the *Lemon* test, the Court concludes that governmental action has no secular purpose only when there is no question that the action "was motivated wholly by religious considerations").

For its holding that the challenged display lacks a secular purpose, the court of appeals relied heavily on the inapposite case of *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*). That decision is inapplicable here because it

struck down a state statute that required the Ten Commandments to be posted, by itself, on the wall of every public school classroom. *Id.* Posting the Ten Commandments by itself on classroom walls could be understood only as having the purely religious purpose of seeking "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.* at 42; *see also Lynch*, 465 U.S. at 679 (stating that the Court invalidated the challenged statute in *Stone* because the Commandments were posted in a school setting "purely as a religious admonition"). This is far different than a display that includes many historical legal symbols, not just the Ten Commandments, and that is presented at a courthouse, rather than in a school setting where Establishment Clause concerns are much stronger. "Indeed, the Court acknowledged in *Stone* that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987); *see also id.* at 583-84 (stating that "[t]he Court has been particularly vigilant monitoring compliance with the Establishment Clause in elementary and secondary schools" because "[s]tudents in such institutions are impressionable and their attendance is involuntary").

The relevant cases are *Lynch* and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), in which the Court applied the *Lemon* test to displays that were on public space outside the school setting and included purely secular symbols with a religious symbol. In these cases, the Court rejected Establishment Clause challenges to the inclusion of a religious symbol as part of the broader display, without

any requirement that the display present an explanation demonstrating the connection that the religious symbol had with the other symbols. *See Lynch*, 465 U.S. 668 (crèche); *Allegheny*, 492 U.S. 573 (menorah). Thus, contrary to the court of appeals' decision, a courthouse display of historical legal symbols that includes a depiction of the Ten Commandments does not fail the first prong of the *Lemon* test if it lacks an explanation of the "analytical or historical connection" between this religious symbol of law and the secular symbols of law.

B. The Primary Effect Of Such A Display Neither Advances Nor Inhibits Religion Because A Reasonable Observer Would Not Perceive The Display As An Endorsement of Religion.

Because of the low hurdle presented by the first prong of the *Lemon* test, the determinative question is whether the challenged display fails under the second part of the test, the "effect" prong. Only one of the judges in the majority of the court of appeals panel addressed this part of the test. *See McCreary*, 354 F.3d at 462 (Gibbons, J., concurring) (expressing no opinion on whether the challenged display violates second prong of *Lemon* test). The opinion of Judge Clay on this issue erred in concluding that the challenged display fails the effect prong because it does not demonstrate an "analytical connection" between the Ten Commandments and the other documents in the display. *Id.* at 460. As is clear from the Court's decisions addressing displays on public property, the *Lemon* test's second prong does not require that such a courthouse display present an "analytical connection" in order to pass constitutional muster.

In the context of displays of religious symbols on public property, the Court has refined the second prong of the *Lemon* test by clarifying that this "effect" prong is violated only if the display constitutes an endorsement of religion. *See Allegheny*, 492 U.S. at 592-97; *Lynch*, 465 U.S. at 687, 691-94 (O'Connor, J., concurring). The display is an endorsement of religion only if it would be perceived as such by a reasonable observer. *See id.* Under this objective standard, a reasonable observer is one who is already familiar with the history and context of the display, without that information being presented as part of the display itself. *See id.*; *see also Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in judgment) (stating that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion"). Thus, contrary to the approach taken by Judge Clay, the second prong of the *Lemon* test does not require that a challenged display provide the explanatory "analytical connection" envisioned by his opinion.

A reasonable observer with an understanding of history and context would not perceive a courthouse display of historical legal symbols that includes the Ten Commandments to be a government endorsement of religion in general or a government endorsement of the religious meaning of the Ten Commandments for the Jewish and Christian faiths. This is confirmed by the continuous display of the LaFarge murals in the courtroom of the Minnesota Supreme Court since 1905 without any Establishment Clause challenge. It is likewise confirmed by this Court's express approval of the inclusion of

a depiction of Moses and the Ten Commandments on a frieze in its courtroom. *See Lynch*, 465 U.S. at 677 ("The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent – not seasonal – symbol of religion: Moses with Ten Commandments.").

C. A Courthouse Display That Includes The Ten Commandments Does Not Foster Excessive Governmental Entanglement With Religion.

The district court and the court of appeals did not address whether the challenged display violates the third prong of the *Lemon* test. *McCreary*, 354 F.3d at 461 n.11. There is no plausible argument that such a display fails the third prong of the *Lemon* test.

A courthouse display of historical legal symbols that includes the Ten Commandments simply does not give rise to the excessive governmental entanglement with religion proscribed under the *Lemon* test. Erecting and maintaining such a display does not involve the expenditure of public funds to support a religious organization. Nor does it otherwise involve the government with a religious program or authority. *See Lemon*, 403 U.S. at 612 (stating that "the three main evils against which the Establishment Clause was intended to afford protection [are] 'sponsorship, financial support, and active involvement of the sovereign in religious activity'") (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

D. Affirming The Court Of Appeals Would Cast Doubt On The Constitutionality Of Longstanding Displays That Include Depictions Of The Ten Commandments At State And Federal Courthouses.

Given its faulty reasoning, affirming the court of appeals would place in doubt the constitutionality of other courthouse displays that include the Ten Commandments and have stood for decades without being challenged, such as the LaFarge murals in the courtroom of the Minnesota Supreme Court. As the dissent correctly noted:

> It is uncontested that depictions of the Ten Commandments and Moses appear in secular context in, among other places, the United States House chamber, the entrance to the national archives, and in three separate locations in the United States Supreme Court, as well as numerous courtrooms and legal settings across the country.

McCreary, 354 F.3d at 481-82 (Ryan, J., dissenting). Under the court of appeals' erroneous reasoning, such longstanding displays in Minnesota and elsewhere would be at risk of a challenge that they lack a secular purpose or constitute an endorsement of religion on the ground that the display does not present sufficient information demonstrating an analytical or historical connection between the depiction of the Ten Commandments and the other symbols in the display.

The *Lemon* test, when properly applied, does not expose such longstanding courthouse displays, like the LaFarge murals in the Minnesota State Capitol building, to a viable Establishment Clause challenge. As Justice

Stevens aptly stated in discussing the frieze on the south wall of the courtroom of the United States Supreme Court:

> [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part) (citations and footnote omitted).

Thus, the Court should reject the court of appeals' reasoning and confirm that the Establishment Clause, as articulated in the *Lemon* test and the Court's decisions applying that test, does not require depictions of the Ten Commandments to be excised from courthouse displays of historical symbols of law.

CONCLUSION

The Court should conclude that, under the existing *Lemon* test, a depiction of the Ten Commandments in a courthouse setting does not violate the Establishment Clause when displayed in conjunction with other historical symbols of the legal system.

Respectfully submitted,

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Dated: December 8, 2004

(9)

No. 03-1693

Supreme Court, U.S.
FILED
DEC 3 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

MCCREARY COUNTY, KENTUCKY *et al.*, *Petitioners*

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY *et al.*, *Respondent*

On Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, THE HORACE MANN LEAGUE AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI*[1]

The National School Boards Association (NSBA) is a federation of 49 state school boards associations, the Hawai'i State Board of Education, and the school boards of the District of Columbia and the U.S. Virgin Islands. NSBA represents the 95,000 school board members who serve America's 15,000 public school districts and more than 47 million public school students. NSBA is dedicated to the improvement of public education in America.

The Horace Mann League was founded by a group of leading educators in 1922. According to the League's beliefs, our public schools should be free, classless, nonsectarian, and open to all children of all of the people. The schools should be dominated by such purposes as will ensure the preparation of children and youth for effective citizenship in our democracy.

The National Association of Secondary School Principals (NASSP)—the preeminent organization and the national voice for middle level and high school principals, assistant principals and aspiring school leaders—provides its members the professional resources to serve as visionary leaders. NASSP promotes the intellectual growth, academic achievement, character development, leadership development, and physical well-being of youth through its programs and student leadership services. NASSP sponsors the National Honor Society™, the National Junior Honor Society™, and the National Association of Student Councils™.

Amici have a longstanding interest in the effective development and implementation of local school board

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members and counsel made any monetary contribution to the preparation or submission of this brief.

policies, including those assuring compliance with the Establishment Clause. They have participated in efforts to find reasonable common ground regarding issues of religion in public schools. Included in those efforts is submission of *amici curiae* briefs to this Court in 11 cases on issues involving religion in the public schools.

For many years, *Amici* have supported the constitutional principle of the separation of church and state. On the question of the posting of the Ten Commandments, public schools are not of one mind. Some believe that displaying this document adds an appropriate historical context to the study of American law and government. Others believe that any such posting would cross the line, introducing a clearly religious document into the public arena. Because of this philosophical disagreement, *Amici* do not take a position on the merits of the posting of the Ten Commandments in public buildings. Regardless of the lack of consensus on this specific issue, *Amici* believe that this case provides a prime opportunity for the Court to set forth a unified standard of analysis in Establishment Clause cases affecting public schools.

SUMMARY OF THE ARGUMENT

The conflict and confusion in the courts as to which Establishment Clause analysis to apply and how to apply it have caused great chaos and confusion for communities, public school administrators, and board members when questions regarding the role of religion in public schools arise. Questions regarding the role of religion in public schools are pervasive and frequent across the nation. *E.g.*, How much religious music can be included in a school concert? How may schools recognize religious holidays? Can students distribute religious flyers in school? How far can teachers go in professing their personal religious beliefs within the school? Every

day public school administrators and board members across the nation face these questions. Every day their decisions are challenged by interest groups who choose to use the schools as their forum to clarify the boundaries of religious rights and individual liberties. By setting forth a clear and consistent analysis for use in Establishment Clause cases, this Court would help minimize these disputes and the ensuing litigation that plague our nation's schools.

Amici urge this Court to adopt the "endorsement analysis" as the overarching framework for Establishment Clause cases. Consistent use of the endorsement analysis would assist public school administrators and board members since it retains the concepts of purpose and effect, concepts clearly derived from the *Lemon* test. However, it provides some much needed clarifications. It focuses on the actual and perceived purpose and effect of the activity in question. Secondly, it provides flexibility by using the "reasonable observer" standard. Finally, it recognizes the concept that no individuals should feel they are not full members of our nation due to their religious beliefs, which is critically important to the relationship between students and the public schools. This Court's clear adoption of this analysis would help public schools handle Establishment Clause issues in a way that respects the relationship between school and student and recognizes the "dizzying religious heterogeneity" of our nation. *Newdow*, 124 S.Ct. at 2321.

Currently, the intersection of public schools and religious faith is legally and politically fraught with peril. Clarity and consistency are needed to guide public school administrators' and board members' decision-making and actions on the appropriate role of religion in the public schools. Clarity and consistency are needed to provide a clear standard against which their decisions and actions can be measured. This would offer credibility to their decisions and actions. Clarity and consistency from this

Court could build a consensus within the nation on the appropriate role of religion in our public schools and thereby reduce the disputes and ensuing litigation that encumber our nation's public schools.

ARGUMENT

I. The erosion of the *Lemon* test has deprived public school administrators and board members of the clear guidance they need in Establishment Clause cases.

The Establishment Clause has been well litigated over the 33 years since this Court handed down its seminal decision of *Lemon v. Kurtzman* in 1971. Many of these decisions have dealt with establishment of religion within the context of elementary and secondary education.[2]

[2] *Lemon v. Kurtzman*, 411 U.S. 192 (1971); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Statutes providing tuition reimbursement to parents of students in nonpublic school violated Establishment Clause.); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (Maintenance and repair grants to nonpublic schools and tax benefits to parents with children enrolled in nonpublic schools impermissibly advance religion.); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (Statute which provided for reimbursement of nonpublic schools for expenses of certain tests but included no means to ensure tests were free of religious instruction violated Establishment Clause.); *Meek v. Pittenger*, 422 U.S. 1049 (1975) (Direct loan of instructional materials and equipment to nonpublic schools and provision of certain auxiliary services for students in nonpublic schools violate Establishment Clause; lending textbooks to children in nonpublic schools is constitutional; overruled in part by *Mitchell v. Helms*); *Wolman v. Walter*, 433 U.S. 229 (1977) (Loan of textbooks to private school students and providing standardized tests, scoring services, speech and hearing diagnostic services in the nonpublic schools and therapeutic services at a neutral site are constitutional; provision of instructional materials and equipment and unrestricted transportation and services for field trips are unconstitutional; overruled in part by *Mitchell v. Helms*); *Stone v. Graham*, 449 U.S. 39 (1980) (Posting of the Ten Commandments in public school classrooms violates the Establishment Clause.); *New York v. Cathedral Acad.*, 434 U.S. 125 (1977); *Committee For Pub. Educ. v. Regan*, 444 U.S. 646 (1980) (Cash reimbursement to private religious schools for cost of administering and grading of state written tests does not violate the Establishment Clause.); *Mueller v. Allen*, 463 U.S. 388 (1983) (Allowing deductions from state income tax for educational expenses incurred by parents of elementary and secondary school students does not violate Establishment Clause.); *Lynch v. Donnelly*, 465 U.S. 668 (1984)(Inclusion of crèche in city's Christmas display does not violate Establishment Clause.); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Moment of silence statute intended to bring prayer into classroom violated Establishment Clause.); *Aguilar v. Felton*, 473 U.S. 402 (1985) (Placing public school teachers in private religious schools to provide remedial services under federal statute violates Establishment Clause.); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (School district violated Establishment Clause by paying private religious school teachers to teach private school students on religious school premises and sending public school teachers to private schools to teach supplemental courses.); *Bender v. Williamsport*, 475 U.S. 534 (1986)(Individual school board member lacked standing to challenge court order that district grant access to religious group to meet on school grounds.); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (State statute requiring teaching of creation science violated Establishment Clause.); *Bowen v. Kendrick*, 487 U.S. 589 (1988)(Giving federal grants to religious organizations to provide adolescent counseling does not violate Establishment Clause.); *Westside Cmt'y. School v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act does not violate Establishment Clause.); *Lee v. Weisman*, 505 U.S. 577 (1992) (Practice of clergy led prayer at high school graduation violates Establishment Clause.); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (Allowing religious film to be shown on school premises after school hours does not violate Establishment Clause.); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (State's provision of sign language interpreter to student attending a parochial school does not violate Establishment Clause.); *Kiryas Joel Vill. School Dist. v. Grumet*, 512 U.S. 687 (1994) (Establishment of a school district along religiously distinct geographic lines violates the Establishment Clause.); *Agostini v. Felton*, 521 U.S. 203 (1997)(Providing Title I remedial services to students on sectarian school premises does not violate Establishment Clause.); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000) (Prayer over the loud speakers at high school football games violates the Establishment Clause.); *Mitchell v. Helms*, 530 U.S. 793 (2000) (Loan of state funded educational materials to parochial schools does not violate Establishment Clause.); *Good News*

Consensus in these cases is rare. Of the 28 public school cases, only two were unanimous, ten were 5 to 4 decisions, and seven were decided by a plurality of this Court. In all, these cases have yielded over 100 written opinions of the Justices. Needless to say, these opinions do not offer clear guidance to public school administrators and board members.

The three-pronged analysis of the "*Lemon* test"[3] has been accepted as the primary mode of analysis for Establishment Clause cases. However, courts have struggled to apply it consistently, yielding sometimes disparate and unpredictable results. This Court has also found the application of the *Lemon* test problematic, applying the prongs in various manners and with inconsistent emphasis.

The primary purpose prong of *Lemon* has in general not been rigorously scrutinized. In fact, this Court has, in most cases, accepted the stated secular purpose at face value. However, in several public

v. Milford Cent. School, 533 U.S. 98 (2001) (School policy prohibiting religious groups from using school facilities after hours is not required by the Establishment Clause.); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Grant of private school vouchers, which includes tuition vouchers for parochial schools, does not violate Establishment Clause.); *Elk Grove Unified School Dist. v. Newdow*, __ U.S. __, 124 S. Ct. 2301 (2004) (Non-custodial parent lacks standing to bring Establishment Clause challenge to school policy requiring recitation of Pledge.).

[3] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court struck down a statute providing salary supplements for teachers in private schools, salary reimbursement for private school teachers, and instructional materials. This Court consolidated the criteria that had been developed in previous cases to determine whether a government program establishes religion. The analysis that emerged considers whether: 1) the program has a secular legislative purpose, 2) the primary effect neither advances nor inhibits religion, and 3) the program does not foster an excessive entanglement between government and religion. *Lemon*, 411 U.S. at 612–613.

education cases,[4] this Court has closely scrutinized the asserted purpose of a challenged practice and found no secular purpose for the statutes challenged. This Court disregarded the secular purpose stated by the governmental entity and searched for actual motives on the part of the state. Two of the three opinions reversed the trial court's determination of a secular purpose. Justice Rehnquist's dissent in the earliest of these cases, *Stone v. Graham*, took issue with the "summary rejection of a secular purpose articulated by the legislature and confirmed by the state court." 449 U.S. at 43 (Rehnquist, J., dissenting.) He argued, in essence, that the courts should not supplant their self-determined purpose of the legislation for the legislature's stated purpose.

The effects prong has proved similarly problematic in application, especially in the public school context where the effects of a particular policy or practice are both secular and sectarian. In such cases, the courts have not clearly indicated how much of a sectarian effect must be present to invalidate a provision. In every school aid case, it is apparent that any functional assistance to parochial education frees other dollars for use in support of the school's religious mission. Furthermore, any assistance to parents, such as tax credits or tuition vouchers, results in increased enrollment in parochial

[4] *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000). The *Lemon* test was not at the core the decision in *Santa Fe*. Rather, this Court used a number of analyses to strike the district policy. First, it was determined that the prayer was not private speech as claimed by the respondent. Second, the policy was held to be coercive since some students must attend games for class credit. Third, it was determined that the policy would lead reasonable observers to perceive that the school endorsed the religious activity. Finally, the Court found that the long-standing practice of public prayer at football games had an unconstitutional religious purpose.

schools, thus benefiting religion to some degree. Yet such practices have been upheld by this Court, characterizing such aid as having an incidental, rather than a primary, effect of promoting religion. This Court has pointed out that where aid flowing to religious organizations results from private individual decisions, rather than state action, the primary effect is not the governmental advancement of religion.

The excessive entanglement prong has also proven difficult to apply in practice in the public school context. The Establishment Clause requires the state to see that public funds are not spent for religious purposes. Yet, the type of recordkeeping or monitoring that the Establishment Clause appears to require in K-12 settings is just the type of surveillance that is forbidden under the excessive entanglement prong. Furthermore, there is a potential for excessive entanglement when religion creates political divisiveness by making some citizens feel they are "outsiders" because of their religious affiliation. There are few contexts where the appropriate role of religion in public life has engendered more divisiveness among citizens than in the public schools, making it virtually impossible for education officials to take any action that is not viewed by one side or the other has crossing the constitutional line.[5] This a particularly

[5] For example, the following conflicts have been reported in the media recently (some of the same conflicts arise in many districts across the nation) : whether an elementary student could distribute candy canes with a religious message attached to her classmates; whether the content of a student's graduation speech was too religious; whether bricks inscribed with crosses could be placed on a sidewalk as part of a parents' fundraiser; whether a minister could post flyers promoting parenting seminars at his church on the school's bulletin board; whether schools may exclude flyers promoting activities at religious institutions from distribution in students' weekly communications packets; whether a school could require a teacher's aide to stop wearing a necklace with a cross on it on the outside of her garments; whether a school district is required to provide bus transportation to

troubling phenomenon since public schools' very mission involves fostering a sense of unity and commitment to understanding and tolerance among all members of hugely diverse communities.

The intrinsic problems in the application of *Lemon* to public education as well as underlying differences in constitutional philosophy have led to criticism by this Court of the *Lemon* analysis, beginning in the 1980s. For example, Chief Justice Rehnquist expressed his reservations in *Wallace v. Jaffree*, 472 U.S. at 107–113 (Rehnquist, C.J. dissenting), outlining his interpretation of the history of religious freedom in the United States,

students attending religious schools; whether students could sing a hymn at graduation ceremonies without substituting the word "God" with the word "Him" in the song; whether the district is required to review all student graduation speeches to ensure they do not contain prayer or proselytizing language; whether the school has to establish a Fellowship of Christian Athletes at the high school; whether a student may perform a song entitled "The Prayer"; whether the local school board may begin its meeting with a prayer; whether the school district must accept student service in the form of religious worship to fulfill the school's community service requirement; whether the school district's holiday which includes a menorah must also include a crèche; whether teachers may include the teaching of other cultures and religious beliefs in their lessons; may schools prohibit the reading of religious texts during student's oral reading assignments; whether students may distribute religious messages within the school; whether the school must allow religious organizations use of school facilities outside the school day; whether school districts may charge a fee for religious organization's use of school facilities outside the school day; whether the state may require home schooling parents to notify the state department of education of their curricula; whether a school may allow a student to fulfill his senior project by conducting a Bible study class; whether a school district can collaborate with religious institutions to provide services to students outside the school day; whether a school may have Halloween celebrations including the wearing of costumes and distribution of candy during the school day; whether a student may distribute a statement of her religious beliefs to her classmates during the school day. Accessed from COSA School Law Issues Page, religion, news, available at http://www.nsba.org/site/page.asp?TRACKID=&CID=469&DID=8754

and arguing that this Court's previous rulings in this area have been based on a misinterpretation of history. Concluding that the Establishment Clause was only intended to prohibit a national church and prohibit preference between denominations, he urged the abandonment of the metaphor of the "wall of separation" and contended that the *Lemon* analysis was unworkable. Justice Scalia has often similarly criticized the *Lemon* test and has repeatedly sought its abandonment.[6] As stated in response to the Court's application of the *Lemon* test in one case:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* [citations omitted] conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

[6] *E.g., Lee v. Weisman*, 505 U.S. 597 (1992); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Kiryas Joel Vill. School Dist. v. Grumet*, 512 U.S. 687 (1994).

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. at 400 (Scalia, J. concurring).

In addition to direct criticisms of the *Lemon* test, Justices have dealt with the shortcomings of *Lemon* by developing additional analyses. By denigrating *Lemon's* flaws and crafting new Establishment Clause analyses, this Court has clearly signaled its lack of confidence and consequently caused disarray among lower courts and confusion among public school administrators and board members who scramble for clear guidance to inform their decision-making and practices in this difficult area. For example, the court in *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), *cert. denied,* 524 U.S. 953 (1998), called upon to decide the constitutionality of the use of Christian music for a high school choir's performance, declared Establishment Clause jurisprudence "muddled." It viewed the "vigorous attack" that had been waged against *Lemon* by the Justices of the Supreme Court and commentators alike as causing "uncertainty. . .regarding the appropriate Establishment Clause analysis. " Because the endorsement analysis has gained wider acceptance among the Justices than any other analysis, the Tenth Circuit ultimately chose to apply the purpose and effects components of the endorsement analysis together with the entanglement criterion imposed by *Lemon* (although it doubted the workability of the purpose prong in any of its iterations).

This Court itself had acknowledged the lack of clarity in this line of cases many years ago in *Regan* when it said:

> Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is

> that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the State—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

Regan, 444 U.S. at 662.

Without a clear framework for Establishment Clause analysis applicable to elementary and secondary education, schools have faced increasing litigation from both sides—those claiming schools are hostile to religion and those asserting that schools are foisting state approved religion on their students.[7] As one commentator put it: "the high court's reluctance—or inability, some say—to settle on a single approach to weighing Establishment Clause violation will continue to

[7] As noted in *Elk Grove v. Newdow*, "The citizens of this Nation have been neither timid nor unimaginative in challenging government practices as forbidden 'establishments' of religion. See, e.g., *Altman v. Bedford Central School Dist.*, 245 F.3d 49 (C.A.2 2001) (challenging, among other things, reading of a story of the Hindu deity Ganesha in a fourth-grade classroom); ... *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (C.A.9 1994) (high school biology teacher's challenge to requirement that he teach the concept of evolution); *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680 (C.A.7 1994) (challenge to school supplemental reading program that included works of fantasy involving witches, goblins, and Halloween); ... *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (C.A.9 1985) (challenge to use of *The Learning Tree*, by Gordon Parks, in high school English literature class). *Elk Grove v. Newdow*, 124 S.Ct. at 2324 (O'Connor, J. concurring).

fuel already persistent and creative litigation regarding the separation of church and state."[8]

Jurists, academics, and practitioners facing new Establishment Clause challenges are left in a quandary when it comes to sorting through this line of cases for guidance. This uncertainty leaves public school administrators and board members at a disadvantage, forcing them to navigate this complex maze when setting policies and procedures and when making daily decisions applying these policies to actual situations that arise. Because there is little consistency, no clear standard against which to measure their decisions, and no public consensus on these issues, their decisions often lack credibility. No matter what decisions they make, they are regularly challenged. Public school administrators and board members are at the mercy of advocates who use the current legal confusion to twist and test the limits of the Establishment Clause in creative ways.[9] One researcher who interviewed representatives of the many litigation groups that target public schools on these issues found that these otherwise contentious respondents did all agree on at least one thing.[10] In

[8] *Justices Struggle with a "Lemon"* NATIONAL LAW JOURNAL (July 3, 2000).

[9] *E.g.*, In December, 2004 the Alliance Defense Fund (ADF), an advocacy group, sent a legal memorandum to communities, attorneys, and school districts nationwide, setting forth their interpretation of the Establishment Clause and justifying the observance and celebration of Christmas within the public schools. "The phrase separation of church and state is not in the U.S. Constitution. Yet, by intimidation and disinformation, groups like the ACLU tried to silence all Christians' religious expression." They are offering the services of *pro bono* attorneys to communities who wish to pursue litigation on the issue. Press story available at http://www.theunion.com/article/20041130?NEWS/111300040.

[10] Dr. Joan DelFattore, Bowen Lecture in Education Policy, George Mason University (April 27, 2004).

roughly one third of the controversies over religion in public schools, they say nothing school officials do would stave off litigation—their only choice is which side they want to sue them.[11] Thus this confusion increases the burden on schools and diverts educators' focus from learning to litigation.

Even Justices within this Court have recognized the dilemma in which public school administrators and board members are left. As stated by Justice Scalia: "Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional." *Edwards v. Aguillard*, 482 U.S. 587, 636 (Scalia, J., dissenting). Although the *Lemon* test has been neither formally overruled nor abandoned, its application has become intermittent and uncertain. This Court has not strictly applied the *Lemon* test. In addition to *Lemon*, in public school cases this Court has used three alternative analyses: endorsement, neutrality, and coercion; thus calling into question *Lemon*'s authority and continuing vitality. This state of affairs, while undoubtedly a boon to the advocacy groups' political and fundraising efforts, comes at considerable cost to the nation's schools, school children, taxpayers, and the social fabric.

[11] For example, the following conflicts have arisen recently wherein the school was left in a Catch-22 when their practice is challenged from both political sides as reported in the media: whether the school is required to or is required not to offer a course in its history or literature curricula on the Bible; whether the school must or may not recognize Good Friday as a holiday; whether the school must or may not allow the distribution of Bibles by a local service organization; whether a school must or may not include a disclaimer regarding evolution as a theory, not fact, in the front of science textbooks. Accessed from COSA School Law Issues Page, religion, news: http://www.nsba.org/site/page.asp?TRACKID=&CID=469&DID=8754

II. A clear and consistent Establishment Clause analysis is an imperative in light of the role public schools play in our nation and in the lives of students.

Throughout the long history of Establishment Clause litigation, this Court has drawn a distinction between activities that occur within and outside the context of K-12 education because of the role public schools play in our nation and in the lives of students.[12] As stated in *Aguillard,* 482 U.S. at 583-584:

> This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. [citations omitted] The State exerts great authority and coercive power through mandatory attendance requirements and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [citations omitted] Furthermore, the "public school is at once the symbol of our democracy and the

[12] *E.g., Grand Rapids*, 473 U.S. at 383 ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."); *Aguillard*, 482 U.S. at 583 ("In this case the Court must determine whether the Establishment Clause was violated in the special context of the public elementary and secondary school system.").

> most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools." *Illinois ex rel. McCollum v. Board of Education* 333 U.S. 203, 231 (1948) (Frankfurter, J.).

In the field of public school law, this Court has been asked to address the constitutional rights of students in many situations. In doing so, this Court has taken into consideration the unique role the public schools play in the lives of students, drawing a distinction between the state acting as government and the state acting as an educational institution. The relationship between government and citizen is different from the relationship between the state as public school and student. As stated when this distinction was first directly addressed: "First Amendment rights, applied in light of special characteristics of the school environment, are available to teachers and students." *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969). The special characteristics considered are the nature of the activity being conducted in the school, *i.e.*, education, the age and maturity of the student involved, the need for the school to maintain discipline, and the mission of the school to inculcate values and teach appropriate behavior.

School officials are expected to educate, protect, and inculcate values. It is the nature of this relationship that causes the heightened concern in Establishment Clause cases. The treatment students receive within the public school has a profound impact on their lives and their view of our nation and its values. No child should be left to wonder if he or she is a full citizen in our nation's public schools. Consistent with the dictates of the Establishment Clause, no student should feel an outsider

because of his or her religious beliefs.[13] Because it is the role of the schools to educate students, inculcate values, and protect them, when the school even slightly favors a religion, or any religion, there is a great danger of establishment of religion.

The need for clear and consistent Establishment Clause analysis is no more apparent than in cases where schools must balance the free speech rights of students and faculty with their obligation to maintain separation of church and state. Recognizing the special influence that schools wield over the minds and lives of their students, school policies often seek to limit religious expression during school-sponsored activities and on school premises, citing Establishment Clause concerns. But such decisions are frequently challenged as violating the free speech rights of those who wish to express the religious message. In deciding these cases, courts have used a jumble of the current Establishment Clause standards to arrive at opposite conclusions in factually similar situations.[14]

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[13] "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch*, 465 U.S. at 688 (O'Connor, J. concurring.)" *Sante Fe v. Doe*, 530 U.S. at 309–310.

[14] *Compare Seidman v. Paradise Valley Unified School Dist.*, 327 F.Supp.2d 1098 (D. Ariz. 2004) (finding parental inscriptions with religious content on wall tiles in elementary schools would not be perceived as endorsement of religion and that excluding such messages would violate parents' free speech rights) and *Fleming v. Jefferson County School Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (finding messages on wall tiles in high school would be viewed as school-sponsored speech and therefore school could bar religious messages based on legitimate pedagogical interest in avoiding religious debate, although an Establishment Clause defense alone would have been insufficient).

Public school administrators and board members cannot be left without clear guidance on these daily issues. They need a clear and consistent analysis to guide their decision-making so they can act with a degree of certainty and credibility.

III. A clear and consistent Establishment Clause analysis is a growing imperative in light of the increasing diversity and religious divisiveness in the nation and particularly in the public schools.

The need for a clear and consistent analysis is especially important given the increasing diversity in today's public schools. By the year 2040 "minorities" are projected to represent more than half of America's K-12 student population.[15] This diversity encompasses not only racial and ethnic differences but also a broad spectrum of religious backgrounds, beliefs, and practices. Not surprisingly, there has been a corresponding push to increase the diversity of cultural and religious views presented,[16] acknowledged, and even accommodated in schools.

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[15] *See* L. Olson, *Ed. Week*, Sept. 27, 2000 at 34–35; J. Hansen, 21st Century School Finance: How is the Context Changing Education Commission of the States (2000) at http://ecs.org/clearinghouse/28/04/2804.htm.

[16] Many schools are now trying to incorporate the perspectives of many cultures and world religions into their curricula. W. Nord & C. Haynes, *Taking Religion Seriously Across the Curriculum*, Association for Supervision and Curriculum Development (1998). This push is coming from parents, community members, and educators. The National Center for History in the Schools (NCHS) lists religion as a critical element in the curriculum and recommends the study of Christianity, Confucianism, Daoism, Brahmanism and Hinduism in world history classes for grades 5-12 and the "study [of] religions that are representative of the modern population in order to understand religious diversity and its impact on American institutions and values" in American history classes. *National Center for History in the*

This growing diversity is already reflected in the legal questions administrators and school attorneys face. For example: Can schools offer comparative religion courses? Must the school honor a Jehovah Witness's request to be placed in the custody of another Jehovah Witness family while on a school trip to continue his religious education? Are schools required to excuse Muslim students for extended Friday prayer services? Must schools provide Muslim students with a private place within the school to conduct Friday prayer services? May they provide this private place for prayer for only Muslim students? Can a Druid student be exempted from a school uniform policy on the basis of religious beliefs? Can a Muslim student be exempted from a school uniform policy on the basis of religious beliefs? Must a female Muslim student be exempted from the athletic association's uniform policy on the basis of religious beliefs? Are school officials required to allow students to opt out of classes, such as music and physical education, based on students' religious beliefs? How do schools inquire as to the tenets students' religious beliefs for the purposes of accommodation? [17]

As public schools become more diverse in culture and religion, they must accommodate individuals and their needs and requests in a way that complies with First Amendment principles. Without a clear and consistent analysis to guide their decision-making, public school administrators and board members are left to guess at their peril as to what may or may not be acceptable from a constitutional perspective. If there is

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Schools, National Standards for History, accessed at http://www.sscnet.ucla.edu/nchs/standards/.

[17] All of these issues have been discussed recently on a school attorneys' email group (where public schools attorneys seek the advice of their peers on current issues arising in their practice). Member access to these archived discussions can be found at: http://spirit.sparklist.com/cgi-bin/lyris.pl?enter=cosa.

no clear and consistent analysis to guide or explain their actions, they will certainly be challenged at every turn. Leaving them in a state of uncertainty can only result in more litigation and less education.

IV. This Court's adoption of the endorsement analysis has the potential to bring clarity to Establishment Clause jurisprudence related to public education.

Amici urge this Court to adopt the endorsement analysis that has emerged from Justice O'Connor's *Lynch v. Donnelly*[18] concurrence as the overarching framework for Establishment Clause analysis. Consistent use of the endorsement analysis would assist public school administrators and board members since it retains the concepts of purpose and effect, concepts clearly derived from *Lemon*. However, it is an improvement in that it employs some much needed clarifications. It focuses on the actual and perceived purpose and effect of the activity in question. Secondly, it provides flexibility by use of the "reasonable observer" standard. Finally, it encompasses the concept that no individual should feel they are not full members of our nation due to their religious beliefs, which is critically important to the relationship between students and the public schools. This Court's clear adoption of this analysis would help public schools handle Establishment Clause issues in a way that respects the relationship between school and student and recognizes the "dizzying religious heterogeneity" of our nation. *Newdow*, 124 S.Ct. at 2321 (O'Connor, J. concurring).

[18] This Court held in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that including a nativity scene as part of a city Christmas display was constitutional. Using a summary treatment of the *Lemon* analysis, this Court found that the crèche posed no real danger of establishment of religion because it was merely a passive symbol presented in the context of other symbols of the season.

The workability of the endorsement analysis has been demonstrated in several cases where this Court has applied the O'Connor endorsement modification to the elementary and secondary school context.[19] A majority adopted the endorsement analysis as to the purpose prong in *Wallace v. Jaffree* and *Edwards v. Aguillard*. The analysis was stated as "whether the government's actual purpose is to endorse or disapprove of religion." 472 U.S. at 56 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (O'Connor, J. concurring)); *Aguillard*, 482 U.S. at 578. Justice O'Connor, writing for the majority in *Agostini v. Felton*,[20] employed a modified *Lemon* analysis.[21] Up to now, this use of the endorsement analysis might be viewed as creating a separate line of reasoning, while never clearly repudiating the *Lemon*

[19] *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Stevens, J., O'Connor, J.); *Aguilar v. Felton*, 473 U.S. 402 (1985) (Stevens, J., O'Connor, J.); *Grand Rapids v. Ball*, 473 U.S. 373 (1985) (Stevens, J., O'Connor, J.); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Stevens, J., O'Connor, J.); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Brennan, J., Marshall, J., Blackmun, J., Stevens, J.); *Westside v. Mergens*, 496 U.S. 226 (1990) (Rehnquist, C.J., O'Connor, J.); *Lee v. Weisman*, 505 U.S. 597 (1992) (Stevens, J. O'Connor, J., Souter, J.); *Lamb's Chapel v. Center Moriches*, 508 U.S. 384 (1993) (Rehnquist, C.J., Stevens, J. O'Connor, J., Souter, J.); *Santa Fe v. Doe*, 530 U.S. 290 (2000) (Stevens, J., O'Connor, J., Kennedy, J., Souter, J., Ginsburg, J., Breyer, J.); *Good News v. Milford*, 533 U.S. 98 (2001) (Scalia, J., Souter, J., Thomas, J., Ginsburg, J., Breyer, J.); *Elk Grove v. Newdow*, __ U.S. __, 124 S.Ct. 2301 (2004) (O'Connor, J concurring).

[20] 521 U.S. 203 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985). This Court in *Agostini* did not specifically adopt the endorsement analysis, nor did it specifically reject the *Lemon* analysis. It held that the government program had a secular purpose and did not have a primary effect of advancing religion, but excessive entanglement was subsumed as a part of the primary effect analysis.

[21] In *Mitchell* this Court split on the interpretation of the analysis set forth in *Agostini*. The Court upheld a government program that gave educational materials to private (including religious) schools in a plurality, not a majority opinion, with Justice O'Connor writing a concurring opinion.

test. Clear adoption of the endorsement analysis by this Court would help alleviate the confusion in this area of the law.

The endorsement analysis encompasses both the purpose and effect of the practice in question. "The purpose of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *Id.* at 690 (O'Connor, J. concurring).

Under the endorsement analysis, the inquiry shifts from whether there is a secular purpose to whether government has given its stamp of approval to a particular religious practice or belief. The endorsement analysis allows government to consider religion in making the law. But if by enacting a statute, the state intends to send a message of endorsement of religion, the statute is unconstitutional, regardless of whether it also has a secular purpose.

Lemon's second prong, requiring that a statute's effect must neither advance nor inhibit religion, is altered under the endorsement modification to determine whether a statute, regardless of its legislative intent, in fact, conveys a message of endorsement. This Court explained that an action will be found unconstitutionally to advance religion if "it conveys a message of government endorsement or disapproval of religion." *Grand Rapids,* 473 U.S. at 389. If such a message is conveyed, it would be an impermissible symbolic union of church and state. "This effect—the symbolic union of

government and religion or sectarian enterprise—is an impermissible effect under the Establishment Clause."[22]

By preserving the elements of purpose and effect from *Lemon*,[23] the endorsement analysis uses a framework familiar to school leaders and maintains the validity of past decisions that relied on *Lemon* analysis to determine the constitutionality of past practices and policies related to public education. This will help ensure no massive upheaval of Establishment Clause jurisprudence that would create a legal nightmare for schools.

Secondly, in determining whether the government is sending a message of its approval or disapproval of religion, endorsement analysis focuses on the objective observer. It asks whether the reasonable observer (familiar with the history of the community and the practice) would perceive that the particular government conduct at issue endorsed religion.

This focus on the reasonable observer allows courts to adjust the endorsement analysis to the various circumstances in which Establishment Clause issues arise in the public schools. The endorsement analysis adopts the concept of the reasonable observer because "a subjective approach would reduce the test to an absurdity." *Newdow*, 124 S.Ct. at 2321 (O'Connor, J. concurring). But the reasonable observer standard should not preclude courts from recognizing that when the observer is a student, (*e.g.*, when a high school choral class is assigned exclusively gospel music), it would be appropriate to consider the students' impressionability,

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[22] However this standard was rejected in *Bowen v. Kendrick,* 487 U.S. at 614, where the Court found that "whatever symbolic link might in fact be created by the AFLA's disbursement of funds to religious institutions is not sufficient to justify striking the statute on its face."

[23] Justice O'Connor has clearly distanced herself from the entanglement prong, stating: "I question the utility of entanglement as a separate Establishment Clause standard in most cases." *Aguilar*, 473 U.S. at 422 (O'Connor, J. dissenting.)

age and maturity, and the role of the school in educating and inculcating values. When the observer in the situation is an adult in the broader community, (*e.g.*, when public funds are distributed to religious schools, or when the local school board starts its meeting with a prayer) the analysis should consider an adult's perspective. This provides a comprehensible standard that will help schools avoid the perception of promoting or hindering religion and thereby prevent sending a message that some are outsiders to the school community.

Finally, the endorsement analysis draws attention to the fundamental requirement of the Establishment Clause that each member of the community is a full member of the community, regardless of his or her religious beliefs. This concept is critical in the public school context.

> [T]he "endorsement test" captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or—a particular religious belief is favored or preferred. *** I have framed my inquiry as a specific application of the endorsement test by examining whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders.

Newdow, 124 S.Ct. 2301 at 2326 (O'Connor, J. concurring).

This focus on the message conveyed is particularly appropriate given the educational function of schools to inculcate democratic values in order to create a unified citizenry. (*See* Section II, *supra.*) Because the role of schools is to teach, the messages that public schools send have added significance, particularly because of their power to shape young minds. If the schools' primary purpose is to educate and inculcate values, then students should never receive the message that the school, *i.e.,* the state, is endorsing a religion or any religion or, more importantly, that the child is an "outsider".

To remove any question as to jurisprudential status of the endorsement test, *Amici* urge this Court to give its clear and official approval to the endorsement analysis and to set forth a clear framework for its application.

V. The neutrality and coercion tests are neither broad enough in scope nor sensitive enough in application to serve as a comprehensive analytical framework.

Neither the neutrality test nor coercion test comprehensively addresses the Establishment Clause issues that arise in the public school context. The neutrality test is not sufficiently sensitive to address all Establishment Clause issues that arise in public schools. Further, it is not as clear or consistent as the endorsement standard. The coercion test, al-though useful in free exercise cases, is insufficient protection within Establishment Clause cases.

The neutrality test has been used primarily in government aid cases and focuses on whether the government program at issue treats religion in a neutral

manner.[24] In *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), this Court upheld a tuition voucher program, finding it a neutral means of offering parents the ability to send their children to private (including religious) schools. In *Mitchell v. Helms,* 530 U.S. 739 (2000), a plurality of this Court declared that religiously neutral government conduct that did not favor nor disfavor religion would not violate the Establishment Clause. Justice Thomas's plurality opinion[25] asserted that the presence of private choice ensures neutrality by eliminating the possibility of attributing religious indoctrination to the state.[26]

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

Mitchell v. Helms, 530 U.S. at 809.

Justice Souter's dissent in *Mitchell v. Helms* pointed out the problems with making neutrality the only constitutional test to evaluate government programs that aid religion.[27] "The Court's decisions demonstrate its repeated attempts to isolate considerations relevant to classifying particular benefits as between those that do not discernibly support or threaten support of a school's religious mission and those that cross or threaten to cross the line into support for religion." 120 S. Ct. at 2578 (Souter, J., dissenting). Justice Souter identified three main inquiries that should "complement evenhanded neutrality." First, the type of aid recipients should be

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[24] *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001) (Thomas,); Bender *v. Williamsport*, 475 U.S. 534 (1986) (Burger); *Mitchell v. Helms*, 530 U.S. 793 (2000) (Thomas).

[25] Justice O'Connor in her concurrence in *Mitchell* clearly disagreed with Thomas's neutrality test: "I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible." *Id.* at 837 (O'Connor, J. concurring.) However, Justice O'Connor in *Kiryas Joel* urged that *Aguilar* be reconsidered "in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity towards religion." 512 U.S. at 717-718.

[26] This same concept was referred to as a "circuit breaker" in *Santa Fe v. Doe.* In that case this Court found the students' vote was insufficient to overcome the appearance of school sponsorship of regular prayer at high school football games.

[27] However, Justice Souter referred to a neutrality standard in his majority opinion in *Kiryas Joel* in which the Court found that a distinctly separate school for the Satmar Hasidic secviolated the Establishment Clause. The law's fatal flaw was that it disregarded the mandate of neutrality toward religion required by the Establishment Clause. "Chapter 748 ... departs from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that government power has been or will be exercised neutrally." 512 U.S. at 696.

examined; heightened Establishment Clause concern is required when the recipients are pervasively religious primary and secondary schools. Second, the distribution method for the aid must be scrutinized to determine whether it is direct or indirect and whether genuinely independent choice determines the path of the aid. Finally, the characteristics of the aid must be examined in detail.

While an underlying principle of the Establishment Clause, neutrality as a test affords neither clarity nor consistency. Constitutional analyses have been, within our nation's jurisprudence, enduring conceptual principles used to interpret and apply the constitutional mandates, but they must be sufficiently precise to enable consideration of the complexity of daily decisions and issues to which they are applied. The neutrality test may in part suffice to analyze the constitutionality of government aid to religious institution, but it lacks the necessary jurisprudential sensitivity needed to address the many other Establishment Clause issues that arise in public schools.

The other alternative test employed at times is the coercion test. Under this test, a court evaluates whether the government has coerced individuals into the support of religion. The coercion test provides that "at a minimum...government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so." *Lee*, 505 U.S. at 586. Under this analysis, government accommodation of religion in civic life does not violate the Establishment Clause absent some form of government coercion.

While voluntariness is a factor appropriately considered when violations of free exercise rights are asserted, it should not be used as the sole test in Establishment Clause analysis, merely to permit "accommodation" of the Nation's religious heritage. As

stated in *Engel v. Vitale*, 370 U.S. 421, 430 (1962), "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Coercion may be an appropriate analysis in Free Exercise Clause cases, but it is not in Establishment Clause cases.

Maintaining the distinction between Establishment Clause and Free Exercise Clause analysis is especially important, given that the religious heritage of this country is extraordinarily diverse and becoming more so. The use of a coercion standard as the sole Establishment Clause analysis would mean no religious activity in public schools would offend the Establishment Clause unless students were coerced into participating in it. It would not matter how extensive the religious activities became or how offensive the activity might be to nonadherents, as long as no one was forced to actually participate. No inquiry into the religious practice itself or its effect on students would be necessary, the only consideration being whether the government coerced participation. For example, such a test could arguably permit a school to conduct a communion service at graduation, provided no one is compelled to participate in the service. Under no other Establishment Clause analysis would such a practice be constitutionally acceptable.

CONCLUSION

For 33 years, application of the *Lemon* test has produced analytical difficulties for this Court and those trying to implement its analysis on a daily basis. To compound this problem, this Court has wavered time and again from its application. If Establishment Clause

precedent continues to drift into uncertainty, schools will face the very kind of religious divisiveness against which the First Amendment is intended to guard.[28]

Amici have a strong interest in this Court framing an analytic test that will minimize the confusion that currently exists in Establishment Clause jurisprudence. Clarity and consistency will help guide public school administrators' and board members' decision-making and actions on the appropriate role of religion in the public schools. Granted, even a clear and consistent analysis is no guarantee against differences of interpretation, violations, and conflict, but public school officials would be less likely to improperly endorse religion or to inadvertently inhibit appropriate recognition of religion in public schools. This is especially important as the ethnic and religious diversity that characterizes our society fills our schools, increasing the number and complexity of these questions.

For these reasons, *Amici* urge this Court to clearly adopt an endorsement analysis for Establishment Clause cases involving public schools.

Respectfully submitted,

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[28] *See Lemon*, 403 U.S. at 622. In *Zelman* the dissenting Justices pointed out that entanglement between government and religion would give rise to social divisions based along religious lines that violated the Establishment Clause. 536 U.S. at 683 (Stevens, J. dissenting); 536 U.S. at 685 (Souter, J. joined by Stevens, Ginsburg, and Breyer, JJ., dissenting); 536 U.S. at 716 (Breyer, J. dissenting).

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 03-1693

In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARREL BESHEARS as Pulaski County Judge Executive,

Petitioners,

v.

ACLU OF KENTUCKY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF ON THE MERITS OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The following Questions presented for review will be addressed in this brief:

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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BRIEF ON THE MERITS OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

I. INTRODUCTION

In this brief, Pacific Justice Institute ("Pacific Justice")[1] will address Questions 3 and 4 as presented for review in the Petition for Writ of Certiorari.

Pacific Justice is a nonprofit corporation organized for the purpose of engaging in litigation affecting the public interest. Pacific Justice has participated in litigation involving significant constitutional issues in both federal and state courts, including the Pledge of Allegiance case recently decided by this Court in *Elk Grove Unified School District v. Newdow,* 542 U.S. ___ (2004). In addition, Pacific Justice is a legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties.

II. SUMMARY OF ARGUMENT

The facts relevant to the issues addressed in this brief are summarized as follows. This case involves displays in the McCreary and Pulaski county courthouses of the Ten Commandments,[2] along with the following secular historical and legal documents:

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[1] This brief is filed upon the written consent of the legal counsel for the Petitioners, which has been lodged with the Clerk of this Court. On November 22, 2004 Respondents filed a global Rule 37 consent for all prospective *amici*. Pursuant to Rule 37.6, *amicus curiae*, Pacific Justice, and its counsel of record, Peter D. Lepiscopo, hereby affirm that no counsel for any party authorized this brief in whole or in part and that no person other than counsel of record drafted the brief. No person or entity, other than *amicus*, made any monetary contribution to the preparation or submission of this brief.

[2] The initial displays at the McCreary and Pulaski county courthouses were limited to display of the 10 Commandments. After the litigation commenced, petitioners twice modified the displays to include secular historical and legal documents for purposes of complying with the Constitution. *McCreary*, *infra*, 354 F.3d at 441.

(a) the Star Spangled Banner;

(b) the Declaration of Independence;

(c) the Bill of Rights;

(d) the Magna Carta;

(e) the Preamble to the Constitution of Kentucky;

(f) the national motto of "In God We Trust";

(g) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments;

(h) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation;

(i) an excerpt from President Lincoln's "*Reply to Loyal Colored People of Baltimore upon Presentation of a Bible*" reading, "*The Bible is the best gift God has ever given to man*";

(j) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible;

(k) Lady Justice;

(l) the Mayflower Compact; and

(m) a one-page prefatory description of the display, which reads: "*The Foundations of American Law and Government Display.*"

American Civil Liberties Union of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 440-443 (6th Cir. 2003) ("*McCreary*").

The U.S. District Court for the Eastern District of Kentucky concluded that the courthouse displays contravened the Establishment Clause and ordered immediate removal of the Ten Commandments from the displays at the McCreary and Pulaski county courthouses. *ACLU of Kentucky v. McCreary County*, 145 F.Supp. 845, 853 (E.D. Ky. 2001). The Sixth Circuit affirmed. *McCreary*, *supra*, 354 F.3d at 462.

As an initial matter, it is worth noting that the nature of the displays at the McCreary and Pulaski County courthouses are similar to this Court's friezes on the north

and south courtroom walls. As explained in an information sheet published by the Court's Office of the Curator, the friezes depict "a procession of 'great lawgivers of history' to portray the development of the law." The display includes, for example, such historic and religious figures as Hammurabi, King Solomon, Confucius, and Muhammad. Included within the friezes is **Moses holding two overlapping tablets – the Ten *Commandments***. (App. 1-7; *see, also*, Chief Justice Berger's comment in *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984).)

When viewed in light of past decisions by this Court, the two Religion Clauses of the First Amendment, the Free Exercise Clause[3] and the Establishment Clause,[4] *appear* to have a natural tension between them. However, when understood in their proper historical and substantive context, it is clear that they were intended to compliment one another for the express purpose of securing the most cherished of individual liberties: freedom of one to worship according to one's own conscience.

The proper way to analyze the interplay between the Establishment and Free Exercise clauses is to recognize that the former relates to a *restraint* on governmental *power*, whereas the latter *secures* a *substantive* ***individual*** right (i.e., freedom of religion). Simply stated, the Establishment Clause serves as a shield, protecting the Free Exercise Clause from governmental intrusion. Viewing it from a constitutional perspective, the Free Exercise Clause is *substantive* in nature (i.e., secures an individual *right*), whereas the Establishment Clauses is *structural* in nature (i.e., relates to government power, or restraint thereof). Understanding the Religion Clauses in this way will dispel the clouds of uncertainty presently surrounding Establishment Clause jurisprudence, to wit: the reason there is still confusion and a split in the Circuit Courts

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[3] "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I ("Free Exercise Clause").

[4] "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I ("Establishment Clause").

relative to application of Establishment Clause is because that clause is being interpreted and applied in a manner that is in direct contravention to its very nature and contrary to the intent of the Founders.

As will be demonstrated below, the Court should reconsider and overrule existing Establishment Clause jurisprudence starting with *Everson v. Board of Education*, 330 U.S. 1 (1947) ("*Everson*"),[5] through *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon*") and *Lemon*'s progeny because the problems that presently exist are a direct consequence of the misapplication of the Selective Incorporation Doctrine applying the Establishment Clause to the States (see, e.g., *Everson*). Simply stated, the Court should take the opportunity presented in this case to overrule *Everson*, *Lemon*, and *Lemon*'s progeny by holding that the Establishment Clause is ***not*** incorporated through the Fourteenth Amendment's Due Process Clause, and, therefore, ***not*** applicable to the several states.

Although the invitation to overrule existing Establishment Clause jurisprudence might seem as a dramatic departure from more than fifty years of precedent, the present state of affairs justifies such a remedy.

First, if *Lemon* and its progeny were converted to statutes this Court would declare them unconstitutional

[5] Although in cases decided before *Everson*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) ("*Cantwell*") and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) ("*Murdock*"), this Court indicated that the First Amendment was incorporated through the Fourteenth Amendment's Due Process Clause, those cases concerned the Free Exercise Clause (***not*** the Establishment Clause). It was not until *Everson* that this Court expressly held that the Establishment Clause was made applicable to the states by way of incorporation through the Fourteenth Amendment's Due Process Clause. *Everson*, *supra*, at 8. Consequently, nothing in this brief should be construed as urging that *Cantwell* or *Murdock* be overruled. This is because it is argued in this brief that the Free Exercise Clause, which is a substantive individual right, is incorporated and made applicable to the states; whereas, this brief argues that the Establishment Clause, which is a restraint on ***federal*** power only, is ***not*** incorporated and ***not*** applicable to the states.

as being void for vagueness. For example, contained in this Court's friezes is a depiction of Moses holding the Ten Commandments; while the Sixth Circuit declared the display of the Ten Commandments in the McCreary and Pulaski county courthouses unconstitutional. Are both displays unconstitutional? If not, how does one attempting to comply with Establishment Clause jurisprudence distinguish between the two?

Second, the ***states*** are fully equipped to handle Establishment Clause type challenges under their ***state*** constitutions and within their ***state*** court systems, as all of them have incorporated some form of the Blaine Amendment or this Court's Establishment Clause jurisprudence within their state constitutions.

Finally, the present Establishment Clause jurisprudence has actually resulted in the Establishment Clause and Free Exercise Clause being at odds with one another (as opposed to working harmoniously as the Framers intended). Specifically, an overt hostility towards religion has spread throughout the nation in the wake of the vast misunderstandings resulting from this Court's infamous history of Establishment Clause jurisprudence. One recent example involves a California school district wherein a 5th grade public school teacher was ordered ***not*** to read to his students from, *inter alia*, the Declaration of Independence, George Washington's journal, and other historical papers, because of references made to God in those documents. Furthermore, the teacher was required to submit all of his supplemental materials to the principal ***before*** presenting them to his students (a procedure that was ***not*** required of any other teacher). A civil complaint (see Appendix) challenging the school district's actions was filed on November 22, 2004 in the U.S. District Court for the Northern District of California (*Williams v. Vidmar, et al.*, U.S.D.C. No. C 04-4946). (App. 8-29.)

In March 2004 a comprehensive compilation of this nationwide hostility towards religion and religious persons was submitted to the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights & Property Rights in

testimony presented by constitutional law attorney Kelley Shackelford of Texas (a member of the Bar of this Court and who has argued before this Court). To assist the Court, the comprehensive summary titled, *Examples of Hostility to Religious Expression in the Public Square* is set forth in the Appendix at pp. 30-81.

III. THE COURT SHOULD OVERRULE *EVERSON* AND *LEMON* BECAUSE THE ESTABLISHMENT CLAUSE IS A *RESTRAINT* ON *FEDERAL* POWER AND IS *NOT* A SUBSTANTIVE INDIVIDUAL RIGHT, AND, THEREFORE, DOES *NOT* APPLY TO THE STATES

As will be demonstrated below in greater detail, this Court's decisions in *Everson*, *Lemon*, and *Lemon's* progeny have created constitutional confusion in Establishment Clause jurisprudence and has resulted in an overt nationwide hostility towards religion and religious persons. The time has come for the Court to revisit the issue of whether the Establishment Clause should be applied to the states through the Fourteenth Amendment's Due Process Clause. As will be clear, the answer is that it should not, requiring the Court to overrule *Everson*, *Lemon*, etc.

A. THE HISTORICAL CONTEXT OF THE ADOPTION OF THE ESTABLISHMENT CLAUSE DEMONSTRATES THAT IT IS A RESTRAINT ON FEDERAL POWER, NOT A SOURCE OF A SUBSTANTIVE INDIVIDUAL RIGHT

On June 8, 1789 James Madison submitted to the First Congress[6] proposed amendments to the newly ratified U.S. Constitution. 1 *Annals of Congress* 448, *et seq.* (J. Gales ed., 1834) ("*Annals of Cong.*"). Included within the

[6] Mr. Madison submitted the proposed amendments to the U.S. House of Representatives sitting as a Committee of the Whole. *Id.*

proposed amendments was the precursor of what would later become the Establishment Clause:

> *"The civil rights on none shall be abridged on account of religious belief or worship,* ***nor shall any national religion be established****, nor shall the full and equal rights of conscience be in any manner, or any pretext, infringed."*

Id. at 451 (emphasis added).

After being referred to a select committee, the language proposed by Mr. Madison on June 8, 1789 was modified to read as follows: "*. . . no religion shall be established by law . . .*" *Annals of Cong.*, p. 757. Conspicuously omitted was the word "***national***." This caused Mr. Madison to rise in the House to argue for reinsertion of the word "*national*" before the word "religion." As reported, Mr. Madison voiced his concerns thusly:

> *"Mr. Madison said, he apprehended the meaning of the words to be, that* ***congress*** *should* ***not*** *establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been* ***required*** *by some of the* ***State*** *Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws* ***necessary and proper*** *to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and* ***establish*** *a* ***national*** *religion: to prevent these effects he presumed the amendment was intended and he thought it as well expressed as the nature of the language would admit . . . Mr. Madison thought, if the word* ***national*** *was inserted before religion, it would satisfy* [Mr. Huntington of Connecticut]. *He* [Mr. Madison] *believed that the* ***people feared*** *one sect obtain preeminence, or two combine together, and* ***establish a religion to which they would compel others to***

> ***conform***. *He [Mr. Madison] thought if the word* ***national*** *was introduced, it would point the amendment directly to the object it was intended to prevent."*

Annals of Cong., pp. 758-759 (emphasis added).

What were Mr. Madison's observations relative to using the qualifying term "*national*" before the word "religion" in the proposed amendment? Clearly, they were points relating to ***restraining*** Congress' ***power***, not the securing of a substantive, individual right:

1. That Congress should be restrained from establishing a religion;
2. That Congress needed to be restrained by force of law;
3. That Congress should not compel any person to have (or, for that matter, not have) a specific religious belief;
4. That the use of the term "national" was required by several of the *State* Conventions that had agreed to ratify the Constitution so long as a bill of rights was passed immediately thereafter;
5. That the states were suspicious and concerned that pursuant to the Necessary and Proper Clause[7] Congress might encroach upon state powers and prerogatives in their area of religion;
6. That absent a specific ***restraint*** on ***federal*** power under the Necessary and Proper Clause, Congress might ***establish*** a ***national*** religion;
7. That it was obvious to the author, Mr. Madison, the purpose of the proposed Establishment Clause was to restrain federal power; and

[7] *"The Congress shall have power . . . To make all laws which shall be* ***necessary and proper*** *for carrying into execution the foregoing powers . . ."* U.S. Const. art. I, sec. 8 ("Necessary and Proper Clause").

8. That the insertion of the word "*national*" before "religion" would address the people's concern that Congress might (through combinations of representatives and senators from some states) favor one sect over others, and, thereby, favor and/or establish a religion and compel others to conform to the tenets of a national religion.

Thereafter, Representative Livermore moved that the word "*national*" be replaced and suggested the following version of the clause:

> *"****Congress*** *shall make no laws touching religion, or infringing the rights of conscience."*

Id. at 759 (emphasis added).

Representative Elbridge Gerry took exception to the word "*national*," but for a different reason than Representative Livermore, which related directly to the principle of ***Federalism***:

> *"Mr. Gerry did not like the term national, proposed by* [Mr. Madison]*, and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the* [ratifying] *conventions at the time they were considering the present constitution. It had been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union;* [Mr. Madison's] *motion shows that he considers it in the same light. Those who were called antifederalists at that time complained that they had injustice done to them by the title, because they were in favor of a* ***Federal*** *Government, and the others* [called federalists] *a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made."*

Id. (emphasis added).

Mr. Madison replied to Representative Gerry by assuring him that the form of government established by the Constitution was indeed a federal one:

> *"Mr. Madison . . . observed that the words 'no **national** religion shall be established by law,' did **not** imply that the Government as a national one."*

Id. (emphasis added). Thereafter, Mr. Madison withdrew his language containing the word "*national*." The House then passed Representative Livermore's version that used the term "***Congress***" instead of "national." *Id.*

On August 20, 1789 the House adopted the following language: "***Congress*** *shall make no law establishing religion.*" *Id.* at 796 (emphasis added). Ultimately, the present language of the Establishment Clause was adopted, which expressed the consensus relating to the intent of the First Congress to divest Congress of jurisdiction over religion by placing a ***restraint*** on ***federal*** power: "**Congress** shall make no law respecting the establishment of religion . . ." U.S. Const. amend. I (Establishment Clause).

It is undisputed that from the debates surrounding the proposal of the Establishment Clause, the First Congress had one thing in mind, to wit: **restraining *federal*** power (i.e., Congress' power, not the states) from ***establishing*** a ***national*** religion. In fact, the debates evince that the First Congress spent time fine tuning the language of the Establishment Clause in order to insure that:

1. Congress would not have the power to establish religion; and
2. The principle of Federalism would be embodied in the Establishment Clause.

In discussing the nature and scope of the Establishment Clause, *Amicus* would be remiss if it did not address Thomas Jefferson's metaphor, "a *wall of separation between church and State*," as it relates to the First Congress' construction and adoption of the Establishment Clause. As a reminder, at the time the Constitution was adopted, Thomas Jefferson was in France, and furthermore, he was not a member of the First Congress that constructed and adopted the Establishment Clause. The oft-invoked passage of President Jefferson's January 1,

1802 letter to the Danbury Baptist Association ("*Danbury Letter*") reads as follows:

> *"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building **a wall of separation between Church and State**."*

Lipscomb, Andrew, and Bergh, Albert, *The Writings of Thomas Jefferson*, Vol. 16, pp. 281-282 (1903) ("*The Writings of Thomas Jefferson*") (emphasis added).

The *church and state* metaphor was first referred to by this Court in the late 19th Century in the decision of *Reynolds v. United States*, 98 U.S. 145, 164 (1879) ("*Reynolds*"). *Reynolds*, however, was a Free Exercise case related to the territory of Utah's bigamy statute. In that case, the *church and state* metaphor was simply asserted without explanation. This is most likely because at the time *Reynolds* was decided, 1879, Utah was not a state.[8] Consequently, the issue of whether the Free Exercise or Establishment clauses applied to the states was neither at issue nor contemplated.

More importantly, there has been a recent ***evidentiary*** development that places President Jefferson's Danbury Letter in its complete context relative to the Establishment Clause, which was ***not*** available to this Court when *Reynolds*, *Everson*, or *Lemon* were decided. Specifically, in 1998 the Library of Congress presented an exhibit titled, "*Religion and the Founding of the American Republic*." One particular aspect of the planned exhibit was a display of the Danbury Letter. In order to provide

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[8] Utah was admitted to the Union on January 4, 1896.

context to the exhibit, the Library's Curator, James Hutson, decided that a display of President Jefferson's handwritten ***draft*** of the Danbury Letter ("Draft Danbury Letter") would be educational because it would provide important historical context for the Danbury Letter actually sent by President Jefferson. However, the Draft Danbury Letter contained President Jefferson's deletions, which took the form of bold lines striking portions of the letter. This made the Draft Danbury Letter all but impossible to read. Not to be deterred, Curator Hutson contacted F.B.I. Director, Louis Freeh, to enlist help from the forensic experts at the F.B.I. The result was that the F.B.I.'s experts were able to make the Draft Danbury Letter fully legible. Hutson, James (Curator of the Library of Congress), *Wall of Separation: FBI Helps Restore Jefferson's Obliterated Draft*, Library of Congress Information Bulletin (June, 1998): http://www.ss.loc.gov/loc/lcib/9806/danbury.html (December 4, 2004).

The following excerpt is from the Draft Danbury Letter:

> " . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof; thus building a wall of *eternal* separation between Church & State. ***Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts***. . . . "

(App. 90-91, emphasis added.) The italicized portions of the excerpt were included in the Draft Danbury Letter but omitted from the one finally sent. What is important relative to the Establishment Clause is where President Jefferson follows the *church and state* metaphor with his understanding of the scope of the Establishment Clause: ***"Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts*** . . ." Here, President Jefferson is in complete concurrence with James Madison as to the object of the Establishment Clause: Congress, not the states. Consequently, in the

Draft Danbury Letter President Jefferson clearly expressed that the Establishment Clause was:

1. Based on ***Federalism***;
2. A restraint on ***federal*** power; and
3. Not related to a substantive, individual right.

Id. Based on the foregoing, a more accurate description of President Jefferson's metaphor expressed in the Danbury Letter would be that the Establishment Clause created a *wall of separation between Church and* ***Congress***.

The following letter from President Jefferson to his Attorney General, Levi Lincoln (*"Lincoln Letter"*) places the Danbury Letter in an even clearer context:

> " . . . *The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution.* ***It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings and thanksgivings, as my predecessors did***. *The address, to be sure, does not point at this, and its introduction is awkward. But I foresee no opportunity of doing it more pertinently. I know it will give great offense to the New England clergy; but the advocate of religious freedom is to expect neither peace nor forgiveness from them. Will you be so good as to examine the answer, and suggest any alterations which might prevent an ill effect, or promote a good one, among the people? . . .* "

The Writings of Thomas Jefferson, Vol. 10, p. 305.

The Lincoln letter clearly demonstrates that President Jefferson's Danbury letter was not one of expounding upon the Establishment Clause, but rather purely political in nature. That is to say, as expressed by President Jefferson himself in the Lincoln Letter, he intended to send the Danbury Letter for the purpose of addressing fears of Danbury Baptists Association (which were expressed in an October 7, 1801 letter to President Jefferson). Interestingly, President Jefferson included his Draft Danbury Letter with his letter to Mr. Lincoln for his review and

suggestions. Surely, as the author of the Declaration of Independence, President Jefferson was not sending the Draft Danbury Letter to Mr. Lincoln for review of the correctness of political and governmental theory, but rather for the purpose of making sure it did not have any unintended (i.e., negative) ***political*** consequences.

In summary, the foregoing demonstrates that the historical context in which the Establishment Clause was framed and adopted provides a comprehensive view of the nature and scope of the Establishment Clause. Perhaps it might be advantageous to state what the Establishment Clause is not. It is neither a restraint on the power of the states, nor a source of a substantive, individual right. Thus, the conclusion is inescapable: the Establishment Clause remains today what it was at the time of its adoption: a restraint on federal power. Even in his handwritten Draft Danbury Letter, President Jefferson agrees that by adopting the Establishment Clause, Congress erected a "*wall of eternal separation between Church & State. **Congress thus inhibited from acts respecting religion*** . . ." (App. 90, emphasis added.)

B. THE ESTABLISHMENT CLAUSE SHOULD *NOT* BE APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE BECAUSE IT IS A *RESTRAINT* ON *FEDERAL* POWER, RATHER THAN A SOURCE OF A SUBSTANTIVE INDIVIDUAL RIGHT

The doctrine of applying portions of the Bill of Rights to the states through the Fourteenth Amendment's Due Process Clause is known as the Selective Incorporation Doctrine. *See, e.g., Palko v. State of Connecticut*, 302 U.S. 319 (1937) ("*Palko*"). In rejecting the suggestion that the entire Bill of Rights (save Amendments 9 and 10) be incorporated (known as the "*Total Incorporation Doctrine*"), Justice Cardozo instead invoked the Selective Incorporation Doctrine, whereby a portion of the Bill of Rights will be incorporated if it represents a ***right*** that is

"*found to be implicit in the concept of ordered liberty.*" *Id.* at 325. This doctrine was further clarified by Justice White to include ***rights*** that are "fundamental to the American scheme of Justice." *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968).

When analyzed within the historical context surrounding the adoption of the Establishment Clause (see Section III.A, *supra*), it becomes clear that it is ***not*** sound constitutional doctrine to apply the Establishment Clause to the states by way of the Selective Incorporation Doctrine.

From the outset, it is important to note that at the very time the Establishment Clause was proposed, debated, and ultimately adopted, seven of the fourteen[9] states had state-sponsored churches, Levy, Leonard, *The Establishment Clause: Religion and the First Amendment* 76 (1986) ("*Levy, Establishment Clause*"), and all of the states provided financial aid and state support to advance religion, Bradley, Gerard V., *Church-State Relationships in America* 13 (1987) ("*Bradley, Church-State*"). Interestingly, according to this Court's decisions in *Everson*, *Lemon*, etc., these states would have been acting in absolute contravention of the very Establishment Clause they had just adopted. Of course, the states had no such intention by voting in favor of ratifying the Bill of Rights (and by extension, the Establishment Clause). In fact, their intention is clearly expressed in the language itself as a ***restraint*** on the ***federal*** government's power to interfere with the states' power to deal with the issue of religion. This view is also consistent with Supreme Court Justice Joseph Story's "*Commentaries on the Constitution and Bill of Rights*":

> "*Thus, the whole power over the subject of religion is left **exclusively** to the **State** governments, to be acted upon according to their own sense of justice and the State Constitutions.*"

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[9] This includes the state of Vermont.

Story, Joseph, *3 Commentaries on the Constitution of the United States* § 1879 (1833) ("*Story, Commentaries*") (emphasis added).

In fact, the Establishment Clause is consistent with the Tenth Amendment's embodiment of the principle of Federalism.[10] That is to say, the Establishment Clause serves as a restraint on the power of the federal government relating to religion, thereby reserving jurisdiction to the states. The Tenth Amendment is a restraint on the federal government to exercise only those powers granted to it by the Constitution, reserving all other powers not prohibited by the Constitution vested in the states and people. U.S. Const. amend. X. When construing the Establishment Clause and Tenth Amendment together, it becomes clear that the Establishment Clause is a bar to the ***federal*** (not state) government's exercise of jurisdiction over matters relating to religion.

In the wake of the confusion created by *Everson*, *Lemon*, etc., many constitutional scholars have recently been exploring the conclusion that the Establishment Clause is ***not*** a substantive individual right, but rather a jurisdictional mechanism to restrain the ***federal*** (not state) government's involvement in religion, as the following examples demonstrate:

> *"[T]he Establishment Clause expressed the principle of **federalism**: The federal government could neither establish religion at the federal level, nor disestablish religion in the states."*

Lash, Kurt T, *The Second Adoption of the Establishment Clause*, 27 Ariz. St. L.J. 1085, 1088-89 (1995) (emphasis added).

> *"[T]he establishment clause embodied a structural safeguard to maximize protection of this substantive right: a framework of federalism was instituted to preserve religious liberty by fostering local decision making authority on church/state issues. The **national** government was thus specifically **enjoined** from dictating any policy in the area of religious establishment."*

Lietzau, William K., *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191 (1990) (emphasis added).

> *"The original intention behind the establishment clause, as explained below, seems fairly clearly to have been to forbid establishment of a **national** religion and to prevent federal interference with a **state's** choice of whether or not to have an official state religion."*

Paulson, Michael A., *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Not. Dame L. Rev. 311, 317 (1986) (emphasis added).

Finally, *"[T]he establishment clause was meant to reserve powers to the several **states**."* Snee, Joseph M., *Religious Disestablishment and the Fourteenth Amendment*, Wash. U. L. Q. 371, 379 (1954) (emphasis added).

In order to properly understand why the Establishment Clause should ***not*** be applied to the states, the congressional intent and purpose of the Fourteenth Amendment's Due Process Clause must be considered. The Thirty-Ninth Congress proposed the Fourteenth Amendment on June 13, 1866. Cong. Globe, 39th Cong., 1st Sess. 3144 (June 13, 1866). It was ratified two-years later by three-fourths of the states on July 21, 1868. Cong. Globe, 40th Cong., 2d Sess. 4294-96 (1868). The relevant portion of section 1 of the Fourteenth Amendment provides:

> " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

U.S. Const. amend. XIV, sec. 1 ("Due Process Clause").

In the debates surrounding Congress' passage of the Fourteenth Amendment there was no indication that the Due Process Clause was intended to make the Establishment

[10] The Tenth Amendment provides: *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."* U.S. Const. amend. X.

Clause applicable to the states. Moreover, during the ratification debates held by the states, statements made by state governors, and news articles in the states are devoid of any discussion that the Establishment Clause was to be applied to the states through the Due Process Clause. Fairman, Charles, *Does the Fourteenth Amendment Incorporate the Bill of Rights*? 2 Stan. L. Rev. 5, 81-132 (1950). Had any mention been made that the intent and/or application of the Due Process Clause was to apply the Establishment Clause to restrain state governments, there would have been evidence of vigorous debates in this regard. This is true because at the very time of the state ratification debates the states had provisions in their state constitutions that would be in direct contravention of the Establishment Clause. For example, on July 7, 1866 New Hampshire ratified the Fourteenth Amendment, and at the same time its state constitution provided:

> "*The people of this State have a right to empower, and do hereby fully empower the legislature to authorize, from time to time, the several towns, parishes, bodies corporate or religious societies, within this State, to make adequate provision, at their own expense, for the* ***support and maintenance*** *of* ***public Protestant teachers of piety, religion, and morality***."

N.H. Const. art. VI (1784) (emphasis added). Obviously, had New Hampshire comprehended the Due Process Clause to apply the Establishment Clause to their state constitution, there would be a record of it. This is especially true because this provision of New Hampshire's constitution is structural in nature (i.e., it deals with legislative ***powers***). In fact, in December of 1868 (five months ***after*** the Fourteenth Amendment was ratified by the states) the New Hampshire Supreme Court reviewed Article VI. The New Hampshire Supreme Court upheld Article VI on the ground that the issue of religion was a matter resting exclusively with the states. In support of this position, the New Hampshire Supreme Court quoted from Justice Story's Commentaries, sections 1879 and 1873, respectively:

> "*. . . the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions . . .*"

Hale v. Everett, 53 N.H. 1 (1868).

Additional examples are evident in the constitutions of North Carolina and Tennessee. On July 4, 1868, North Carolina ratified the Fourteenth Amendment, which, at that time, had a provision in its state constitution that ***denied*** anyone "*who shall deny the being of Almighty God*" from holding any public office. N.C. Const. art. VI, sec. 5 (1868). On July 19, 1866, Tennessee ratified the Fourteenth Amendment. Similar to the North Carolina constitution, Tennessee's state constitution prohibited the holding of public office by "*any person who denies the being of God, or a future state of rewards and punishments . . .*" TN Const. art. IX, sec. 2 (1843).

Had the notion of applying the Establishment Clause to the states through the Fourteenth Amendment's Due Process Clause been contemplated during the debates in Congress or the state ratification debates, there most certainly would have been a record. In fact, no such record exists. Consequently, to assume that this *structural* change to the principle of Federalism should be either assumed or implied (as was done in *Everson*) would lead to unexpected constitutional consequences. This is precisely what has occurred in Establishment Clause jurisprudence, which has lead to the confusion created by *Lemon* and the resultant split among the federal circuit courts relative to applying *Lemon* in a rational and uniform manner.

There is further evidence that neither the Congress nor the states ratifying the Fourteenth Amendment intended to use the Due Process Clause to apply the Establishment Clause to the states. Specifically, in his annual message to Congress in 1875, President Grant proposed that Congress pass a constitutional amendment to prohibit the ***states*** from providing religious instruction in public schools and the expenditure of public funds to

benefit religious groups. 4 Cong. Rec., 44th Cong., 1st Sess., 175 (1875). This proposal was taken up by Senator James G. Blaine with the introduction of what is known as the "*Blaine Amendment*," which provided:

> *"No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or domination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations."*

4 Cong. Rec., 44th Cong., 1st Sess., 5580 (1875) (emphasis added).

In addition to the mere introduction of the amendment, the congressional debates of the Blaine Amendment provide further proof that the 39th Congress did ***not*** intend the Fourteenth Amendment's Due Process Clause to apply the Establishment Clause to the states.

One interesting point about the members of the 44th Congress: twenty-three of them were members of the 39th Congress that adopted the Fourteenth Amendment, and at least fifty were members of the state legislatures that ratified the Fourteenth Amendment. O'Brien, William F., *The States and No Establishment: Proposed Amendments to the Constitution since 1789*, 4 Washburn L.J. 183, 208 n.105 (1965). Of particular interest are two members who were representatives in the 44th Congress were also senators in the 39th Congress that adopted the Fourteenth Amendment. These senators, Boutwell and Conkling, were also on the committee which drafted the Fourteenth Amendment. Meyer, Alfred W., *The Blaine Amendments and the Bill of Rights*, 64 Harv. L. Rev. 940, 941 n.14 (1950-1951). Clearly, had the Fourteenth Amendment's Due Process been intended to apply the Establishment Clause to the states they would have been quick to point that out.

Another interesting point about those members of the 44th Congress (who were also members of the 39th Congress) relates to their speeches during debate of the Blaine Amendment. For example, in the House, representative Banks (who was a member of the 39th Congress and voted for the Fourteenth Amendment) argued that the Blaine Amendment (not the Fourteenth Amendment) would alter the ***structure*** of the Constitution relative to the Establishment Clause:

> *"If the Constitution is amended so as to secure the object embraced in the principal part of this proposed amendment* ***it prohibits the States from exercising a power they now exercise.***"

4 Cong. Rec., 44th Cong., 1st Sess., 5191 (1875) (emphasis added). Thus, Representative Banks' statement demonstrates that the 39th Congress (of which he was a member) did not intend to change the structural relationship in the Constitution relative to the Establishment Clause. The Congressional Record does ***not*** reflect any House member stating that the Blaine Amendment was superfluous because the Fourteenth Amendment's Due Process Clause was intended to apply the Establishment Clause to the state governments. The House overwhelmingly passed the Blaine Amendment by a vote of 180 to 7.

Debates in the Senate on the Blaine Amendment provide the most comprehensive piece of evidence that the Fourteenth Amendment's Due Process Clause does ***not*** apply the Establishment Clause to the states. In this regard, Senator Frelinghuysen, a senator during the 39th Congress who voted for the Fourteenth Amendment, stated:

> *"I call attention to the Senate to the first alteration the House amendment makes to our Constitution. The first amendment to the Constitution, enacted shortly after the adoption of the Constitution, provides that – 'Congress shall make no law respecting the establishment of religion . . .'* ***This is an inhibition on Congress, and not the States****. The House article very properly extends the prohibition of the first amendment of the*

> *Constitution to the States . . . Thus the article as amended by the Senate prohibits,* ***for the first time****, from the establishment of religion . . .*"

Id. at 5561 (emphasis added).

The Blaine Amendment failed to garner the support required by the Constitution, but ***not*** because senators were of the opinion that the Fourteenth Amendment's Due Process Clause served to apply the Establishment Clause to the states. To the contrary, Senator Whyte, who voted ***against*** the Blaine Amendment, unequivocally explained his opposition to the amendment:

> "[T]*he first amendment to the Constitution* ***prevents*** *the establishment of religion by* ***congressional*** *enactment . . . and* ***leaves*** *the* ***whole power*** *for the propagation of it with the* ***States exclusively****; and so far as I am concerned I propose to leave it there also.*"

Id. at 5583 (emphasis added).

Finally, the ironic aspect of this Court's decision in *Everson* is that in voting against the Blaine Amendment, Senator Stevenson cited Thomas Jefferson's views as his authority:

> "Friend as he [Jefferson] was of religious freedom, he would never have consented that the States, which brought the Constitution into existence, upon whose sovereignty this instrument rests, which keep it within its expressly limited powers, should be degraded and that the Government of the United States, a Government of limited authority, the mere agent of the States with the prescribed powers, should undertake to take possession of their schools and of their religion . . ."

Id. at 5589 (emphasis added). Clearly, what Senator Stevenson was expressing is the principle of Federalism, which was very near and dear to Thomas Jefferson's heart.

One final point worth mentioning is that although the Blaine Amendment failed to pass the Senate, many states subsequently incorporated its provisions into their constitutions as a condition of admission to the union. As

demonstrated above, the Establishment Clause is a ***restraint*** on ***power,*** not a substantive individual right, which makes it structually impossible to incorporate through the Fourteenth Amendment's Due Process Clause. As so aptly put by a Harvard Law Review article:

> *"Trying to incorporate the Establishment Clause is analogous to trying to incorporate the Tenth Amendment, which reserves those powers neither delegated to the federal government nor forbidden to the states. The intent of the Tenth Amendment is to reaffirm that the states possess all power not delegated to the federal government by the Constitution. Incorporation of the Tenth Amendment would require that the states be stripped of all powers not specifically delegated to them, thereby completely inverting the Amendment's purpose. To the extent that the Establishment Clause is similar to the Tenth Amendment, its incorporation is similarly incoherent. Indeed, one scholar has suggested that the [Establishment] Clause be viewed as a specific application of the Tenth Amendment.*"

Rethinking the Incorporation of the Establishment Clause: A Federalist View, 105 Harv. L. Rev. 1700, 1709 (1992) (*"Rethinking Incorporation"*).

Based on the foregoing the Court should reconsider the advisability of applying the Establishment Clause to the states by way of the Selective Incorporation Doctrine.

C. IT IS NOT CONSTITUTIONALLY NECESSARY TO APPLY THE ESTABLISHMENT CLAUSE TO THE STATES BECAUSE ALL FIFTY STATES HAVE SOME FORM OF RESTRAINT ON THE ESTABLISHMENT AND/OR PREFERENCE OF RELIGION IN THEIR INDIVIDUAL STATE CONSTITUTIONS

Inevitably, the overruling of *Everson*, *Lemon*, and *Lemon*'s progeny begs the question: *What would fill the*

void created by the elimination of 57 years of Establishment Clause jurisprudence? Eliminating Supreme Court review of non-federal Establishment Clause cases would not result in jurisprudential chaos or offend well-settled principles of *stare decisis* and continuity. The reason for this is that all 50 states have clauses in their state constitutions which prohibit the type of state involvement with religion that this Court has elected to review in the almost 60 years since the incorporation of the federal Establishment Clause against the states in *Everson*. In light of the fact that each of the states have already ensured that there is no legitimate concern regarding the establishment of individual state religions, there is no subsequent justification for the United States Supreme Court to continue exercising jurisdiction over non-federal Establishment Clause cases.

Fears that failure to incorporate the Establishment Clause against the states would result in states establishing official religions are mislaid. Twelve of the fifty states have clauses in their constitutions which expressly prohibit the state legislature from establishing an official church.[11] In each of those twelve, the language of their "establishment clause" either mirrors or very closely resembles the federal version.

In addition, a total of thirty-three states have constitutional provisions which forbid the government from exhibiting any preference for one religion or another.[12] In one example, California's "*No Preference Clause*" reads, "Free exercise and enjoyment of religion without discrimination *or preference* are guaranteed."[13] Notably, that particular provision has been interpreted by federal courts

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[11] See App. 82-83, 86, 88, 89: AL, AK, CA, FL, HI, IA, LA, MT, NJ, SC, UT, and VA each have specific clauses forbidding a ***state's*** establishment of religion.

[12] App. 82-89: AL, AK, CA, CO, CT, DE, ID, IL, IN, KS, KY, ME, MA, MN, MS, MO, NE, NV, NH, NJ, NM, NY, NC, ND, OH, PA, SD, TN, TX, UT, VA, WV, and WI.

[13] CA Const. art. I, sec. 4 (emphasis added).

using the U.S. Supreme Court's Establishment Clause analysis as a touchstone.[14] This is evidence that the essential effect of that provision is the same as that of the federal Establishment Clause.

In fact, forty of the fifty states have either Establishment or No Preference Clauses, or both, in their state constitutions. Of the ten remaining states which do not have specific constitutional clauses relating to government establishment or preference for religion, seven have clauses which explicitly forbid expenditure of government funds for sectarian purposes. For example, the Arizona constitution uses the following verbiage in their so-called "No Aid" provision:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."[15]

This clause, as well as those like it in other state constitutions, have the same fundamental purpose and effect as an Establishment or No Preference Clause; ensuring that the state not excessively entangle itself or advance or inhibit a particular religion.

The three remaining states, Maryland, Rhode Island, and Vermont, have not failed to address the issue of state involvement with religion. All have constitutional clauses prohibiting the legislature from enacting laws relating to compulsory church attendance or involuntary support of sectarian causes. While stopping short of including provisions which specifically forbid laws respecting the establishment of religion, these three states each have constitutional provisions restraining the government's ability to coerce belief from its citizens or force them to support a particular religious faith against their conscience.

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[14] *Carpenter v. City and County of San Francisco*, 93 F. 3d 627, 629 n.7 (9th Cir. 1996).

[15] AZ Const. art. II, sec. 12.

Article I Section 3 of the Vermont constitution declares in part:

> "That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; *and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience . . .*"[16]

Likewise, the Maryland constitution holds:

> " . . . nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry . . ."[17]

The Rhode Island constitution similarly propounds:

> "[We], therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract;"[18]

It is reasonable to conclude that such provisions would preclude the establishment of an official state religion in each of the above states, even absent a specific Establishment or No Preference Clause. Were one of the above state legislatures to attempt to establish an official state religion, that action would inherently result in "support [for] a place of worship," "compel[ing] a citizen to contribute" (via tax dollars), or "support [for] a religious worship, place, or ministry" in contravention of the constitutional clauses detailed above.

The importance of the state constitutional limitations on establishment of religion is evident when analyzing the potential impact of a decision by this Court deciding to

[16] VT Const. ch. I, art. 3 (emphasis added).

[17] MD Const. art. 36.

[18] RI Const. art. 1, § 3.

relinquish its practice of hearing allegations of state violations of the Establishment Clause. This Court will be comforted to know that should it decide to refuse to hear issues of alleged establishment clause violations by state actors, the well-settled principles of so-called "separation of church and state" would not crumble; on the contrary, they would remain as strong or stronger than when the Court exercised jurisdiction over those matters.

One method of illustrating this point is to examine several important historical Establishment Clause cases decided by this Court in light of the applicable state constitutional provisions rather than the Establishment Clause of the First Amendment. For instance, one can persuasively contend that the result in *Lemon* would not have been any different had the Pennsylvania State Supreme Court analyzed the Pennsylvania Nonpublic Elementary and Secondary Education Act under the terms of Pennsylvania's "No Preference Clause." The same consequence could have been achieved had the Pennsylvania Supreme Court decided that the Act exhibited a state preference "to [a] religious establishment" without ever necessitating United States Supreme Court review. Failure to invoke federal protections against state establishment of religion would not have resulted in an inability of aggrieved citizens to petition for redress; they could have simply done so under state constitution rather than the federal version.

Likewise, an examination of several other notable Supreme Court Establishment Clause decisions indicates similar results. In *School District of Abington Township, Pennsylvania. v. Schempp*, 374 U.S. 203 (1963) ("*Schempp*") the Pennsylvania Supreme Court again would have been competent to review allegations of inappropriate state entanglement with religion. Clearly, the state law at issue requiring that "passages from the Bible be read or that the Lord's Prayer be recited in the public schools of a State at the Beginning of each school day"[19] would have been

[19] *Schempp, supra.*

subject to intense scrutiny in light of the Pennsylvania constitution's mandate that "no preference shall ever be given by law to any religious establishments or modes of worship."[20] The same can likely be said for the City of Pittsburgh's holiday displays in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

Other notable historical Establishment Clause cases provide further evidence that states are competent to police their own involvement with religion. In *Engel v. Vitale*, 370 U.S. 421 (1962), the issue of school prayer could have been analyzed under the state of New York's No Preference Clause, which states, "*The free exercise and enjoyment of religious profession and worship,* ***without discrimination or preference****, shall forever be allowed in this state to all humankind . . .*"[21] In addition, the practice of state mandated or state sponsored prayer in New York public schools would also have likely run afoul of another New York constitutional provision, Article 11, §3, which states in part:

> "Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, *or in which any denominational tenet or doctrine is taught . . .*"[22]

As the foregoing demonstrates, it is clear that there is no legitimate concern that a decision by this Court "un-incorporating" the Establishment Clause of the First Amendment against the states would result in the establishment of individual state religions. In light of that fact, coupled with the history of the ratification of the First and

[20] PA Const. art. 1, § 3.

[21] NY Const. art. I, § 3.

[22] NY Const. art. 11, § 3 (emphasis added).

Fourteenth Amendments, there is no subsequent justification for the United States Supreme Court to continue exercising jurisdiction over non-federal Establishment Clause cases.

IV. CONCLUSION

A 1992 Harvard Law Review article argues that this Court should revisit the issue of whether the Establishment Clause should be applied to the states through the Fourteenth Amendment's Due Process Clause. One justification for non-incorporation of the Establishment Clause is the point of the original intent behind the adoption of the Establishment Clause:

> *"If the Establishment Clause is to be interpreted according to its original purpose, it is the* ***collective*** *intent of the people who ratified the Clause that must provide its meaning. In fact,* ***the only consensus*** *among the Framers of the First Amendment* [of which Jefferson was not one] *about the appropriate relationship between church and state* ***was to allow the states to decide the issue themselves****. Thus, the only theory of the Establishment Clause that accurately captures the collective intent of the Framers and reflects their divergent views is federalism. The language they chose accommodated both opponents and proponents of state establishments."*

Rethinking Incorporation, *supra*, 105 Harv. L. Rev. at 1705. The article makes this point because in *Everson*, Justice Black (who wrote the opinion) uses the Danbury Letter and other statements made by Madison and Jefferson to conclude that the Establishment Clause was intended to apply to the states. As stated in this article, and as demonstrated in this brief, *supra*, the record of the debates, including the statements of James Madison, demonstrate the complete opposite.

The Court should take this opportunity to reconsider the present state of Establishment Clause jurisprudence. In doing so, Pacific Justice urges that *Everson*, *Lemon*, and

Lemon's progeny be overruled because they are in direct contravention of the Establishment Clause and the Fourteenth Amendment's Due Process Clause. The Court should make clear that neither this Court nor any circuit or district court should apply the Establishment Clause to the states.

Respectfully submitted,

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[Picture Of Supreme Court]

Courtroom Friezes:
North and South Walls

INFORMATION SHEET

Cass Gilbert (1867-1934), architect of the Supreme Court building, selected Adolph A. Weinman (1870-1952), a respected and accomplished Beaux-Arts architectural sculptor, to design the friezes for the Courtroom during 1931 and 1932. Weinman's training emphasized a correlation between the sculptural subject and the function of the building. Gilbert relied on him to choose the subjects and figures that best reflected the function of the Supreme Court building. Faithful to classical sources and drawing from many civilizations, Weinman designed a procession of "*great lawgivers of history*" for the North and South walls to portray the development of law. Each frieze measures 40 feet long by 7 feet, 2 inches high and is made of ivory vein Spanish marble.

Weinman's sculpture begins on the south wall frieze with *Fame* and moves from **left to right.** Included among the great lawgivers are some allegorical figures whose names are included under the photographs in ***Italics.***

App. 2

Menes (c. 3200 B.C.) First King of the first dynasty of ancient Egypt. He unified Upper and Lower Egypt under his rule and is one of the earliest recorded lawgivers. Menes is shown in the frieze holding the *ankh,* an Egyptian symbol for life.

Hammurabi (c. 1700s B.C.) King of Babylon credited with founding the Babylonian Empire. He is known for the Code of Hammurabi, one of the earliest known legal codes. The first stone of the Code depicts him receiving the law from the Babylonian Sun God.

Moses (c. 1300s B.C.) Prophet, lawgiver and judge of the Israelites. Mosaic Law is based on the Torah, the first five books of the Old Testament. Moses is depicted in the frieze holding two overlapping tablets, written in Hebrew. Commandments six through ten are partially visible.

Solomon (c. 900s B.C.) King of Israel and renowned judge. His name, meaning "figure of the wise man," has become synonymous with "judicial wisdom."

Lycurgus (c. 800 B.C.) Legislator of Sparta. Lycurgus is credited with being one of the reformers of Sparta's constitution. He left Sparta after convincing the Spartan leadership not to change his laws until he returned, but he never did.

Solon (c. 638-558 B.C.) Athenian lawgiver. He was appointed *archon,* an officer of state, and was charged with remodeling the Athenian constitution in 594 B.C. He was instrumental in codifying and reforming Athenian law, often revising the laws of Draco. His name has come to mean "a wise and skillful lawgiver."

Draco (c. 600s B.C.) One of Solon's legal predecessors in Athens. Around 620 B.C., he committed an Athenian code

of laws to paper for the first time. His code included many strict penalties and death sentences, often for what seemed to be minor offenses. Thus, the word "draconian," meaning harsh or cruel, is derived from his name.

Confucius (551-478 B.C.) Chinese philosopher whose teachings stressed harmony, learning and virtue. Within 300 years of his death, the Chinese State adopted his teachings as the basis for government. Although officially abandoned by the Chinese government in 1912, Confucianism continues to have an influence throughout the world.

Octavian (63 B.C.-14 A.D.) or Augustus. First Emperor of the Roman Empire. He brought widespread reforms to many facets of Roman life. He supported the concept of using previous opinions of leading jurists to aid in determining new disputes.

The north wall frieze proceeds from **right to left,** starting with Philosophy:

Justinian (c. 483-565) Byzantine Emperor from 527 until his death. He ordered the codification of Roman law and published *Corpus Juris Civilis.* This work was instrumental in preserving Roman law and encompassed what has become known as the Justinian Code.

Muhammad (c. 570-632) The Prophet of Islam. He is depicted holding the Qur'an. The Qur'an provides the primary source of Islamic Law. Prophet Muhammad's teachings explain and implement Qur'anic principles. The figure above is a well-intentioned attempt by the sculptor, Adolph Weinman, to honor Muhammad and it bears no resemblance to Muhammad. Muslims generally have a strong aversion to sculptured or pictured representations of their Prophet.

Charlemagne (c. 742-814) or Charles I (the Great). King of the Franks and Roman Emperor. Charlemagne was reportedly an avid student who became an eloquent speaker of several languages and supported learning and literature throughout his realm. Under his leadership, most of Western Europe was united by 804 becoming the foundation for the Holy Roman Empire. He was also a reformer of legal, judicial and military systems.

King John (1166-1216) born John Lackland. King of England from 1199 until his death. His policies and taxation caused his barons to force him to sign the Magna Carta. This document, depicted in the frieze as a scrolled document in his hand, is regarded as the foundation of constitutional liberty in England.

Louis IX (c. 1214-1270) King of France who was canonized as St. Louis in 1297. He led the 7th and 8th Crusades and created the first court of appeals known as the "Curia Regis" or "King's Court."

Hugo Grotius (1583-1645) or Huig de Groot. Dutch scholar, lawyer and statesman. He is depicted holding *De jure belli ac pacis* (*Concerning the Law of War and Peace*), one of the first books on international law, which he wrote in 1625.

Sir William Blackstone (1723-1780) English law professor and jurist. He wrote *Commentaries on the Law of England* (1765-1769), which has had a major influence on English and American law.

John Marshall (1755-1835) Fourth Chief Justice of the United States, from 1801 to 1835. His 1803 opinion in *Marbury v. Madison* stated that the Supreme Court of the United States had the authority to determine the constitutionality of a law, establishing the power of judicial review for the Court.

Napoleon (1769-1821) Emperor of France from 1804 to 1815. He ordered and directed the recodification of French law into what became known as the Code Napoleon or Civil Code. Published in 1804, this code formed the basis for modern civil law. Napoleon, at St. Helena, is reported to have said, *"My glory is not to have won forty battles; for Waterloo's defeat will destroy the memory of as many victories. But what nothing will destroy, what will live eternally, is my Civil Code."*

Office of the Curator • Supreme Court of the United States

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Updated: 8/18/2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA SAN JOSE DIVISION

STEPHEN J. WILLIAMS,

Plaintiff,

v.

PATRICIA VIDMAR, Principal of Stevens Creek School, WILLIAM BRAGG, Superintendent of Cupertino Union School District, PEARL CHENG, BEN LIAO, JOSEPHINE LUCEY, GARY MCCUE, GEORGE TYSON, Board members of Cupertino Union School District, in their official and individual capacities,

Defendants.

CASE NO. C-04-4946

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

(Filed Nov. 22, 2004)

Comes now the plaintiff, Stephen J. Williams, by and through counsel, pursuant to the Federal Rules of Civil Procedure and against the Defendants avers the following:

I.

INTRODUCTION

1. This case is about the First Amendment rights of Stephen Williams, a public school teacher and orthodox Christian. The Defendants have systematically censored Mr. Williams' choices of supplemental handouts because those handouts – chiefly excerpts of primary source

documents from America's founding era, or from state constitutions – contain some religious content. Defendants have ordered Mr. Williams (but no other current teacher) – to not distribute any supplemental handout unless it appears on a list of authorized handouts that applies only to Mr. Williams. This is a violation of the First and Fourteenth Amendments to the United States Constitution for which Mr. Williams seeks declaratory relief, injunctive relief, nominal damages, costs and attorneys' fees.

II.

JURISDICTION AND VENUE

2. This action arises under the United States Constitution, particularly the First and Fourteenth Amendments; and under federal law, particularly 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988.

3. This Court has original jurisdiction over these federal claims by operation of 28 U.S.C. §§ 1331 and 1343.

4. This Court has authority to issue the requested declaratory relief under 28 U.S.C. § 2201.

5. This Court has authority to issue the requested injunctive relief under 28 U.S.C. § 1343(a)(3).

6. This Court is authorized to award the requested damages under 28 U.S.C. § 1343(a)(3).

7. This Court is authorized to award attorneys' fees under 42 U.S.C. § 1988.

8. Venue is proper under 28 U.S.C. § 1391 in the Northern District of California because this claim arose there, and the parties reside within the District.

III.

INTRADISTRICT ASSIGNMENT

9. Pursuant to L.R. 3-2(e) & 3-5, this case is a civil rights case, in a non-excepted category, suitable for assignment to the San Jose division because the civil action arose in Santa Clara County.

IV.

IDENTIFICATION OF PARTIES

10. Plaintiff Stephen J. Williams is a resident of Mountain View, California.

11. Defendant Patricia Vidmar is Principal of Stevens Creek School, within the Cupertino Union School District. Among other things, this Defendant is responsible for setting the policies at Stevens Creek School and implementing the policies of Stevens Creek School and the Cupertino Union School District.

12. Defendant William Bragg is Superintendent of Cupertino Union School District. Among other things, this Defendant is responsible for setting and implementing policies for schools within the Cupertino Union School District.

13. Defendant Pearl Cheng is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

14. Defendant Ben Liao is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting

policies for schools within the Cupertino Union School District.

15. Defendant Josephine Lucey is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

16. Defendant Gary McCue is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

17. Defendant George Tyson is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

18. Each Defendant is sued in his or her individual and official capacities.

V.

STATEMENT OF FACTS

Background

19. Plaintiff Stephen J. Williams currently teaches fifth grade at Stevens Creek School ("the School"), which is part of Cupertino Union School District ("the District").

20. Defendant Patricia Vidmar is the Principal of the School.

21. Mr. Williams has taught for eight years in the District.

22. Mr. Williams has taught fifth grade for six years.

23. History and Social Studies are among the subjects that Mr. Williams teaches the fifth grade students at the School.

Conflicts Over Handouts and Lessons

24. The District's fifth grade History textbook is entitled "A New Nation: Adventures in Time and Place" ("textbook").

25. Mr. Williams frequently supplements the district-approved textbook with curriculum-related handouts for his students to understand the topic under study.

26. It is not uncommon for teachers within the District to supplement District textbooks with curriculum-related handouts.

27. Mr. Williams chooses supplemental handouts that, in his judgment as a professional educator, satisfy the California History-Social Science content standards for the fifth grade.

28. Many teachers employed by the District supplement the textbooks for each subject with curriculum-related handouts.

29. In his judgment as a professional educator, Mr. Williams cannot satisfy the California History-Social Science content standards for the fifth grade if he does not supplement the textbooks with handouts.

30. When teaching the history of the founding era, Mr. Williams includes original source documents from the founding era, or excerpts from such documents, as his supplemental handouts.

31. When teaching the history of the founding era, many of the documents Mr. Williams distributes as handouts contain references to God and Christianity.

32. Many original source documents from the founding era contain references to God and Christianity.

33. On or about May 19, 2004, Principal Vidmar ordered Mr. Williams to submit all of his lesson plans and supplemental handouts to her for review in advance.

34. Principal Vidmar reviewed Mr. Williams' lesson plans and curriculum-related handouts to determine whether either had religious content such that they would not be permissible for use in or for Mr. Williams' classes.

35. Since approximately May 19, 2004, Principal Vidmar has systematically rejected Mr. Williams' proposed lesson plans and proposed supplemental handouts that contain references to God or Christianity.

36. Mr. Williams is aware that one parent has complained about one handout during a lesson on Presidential Proclamations.

37. Mr. Williams gave a supplemental handout consisting of President George W. Bush's Proclamation on the National Day of Prayer as an example of a Presidential Proclamation. A true and correct copy of this handout is attached as Exhibit A.

38. Other teachers are not required to submit all of their lesson plans and supplemental handouts to Principal Vidmar in advance.

39. Other teachers are permitted to show films and distribute handouts containing references to God.

40. Principal Vidmar has rejected Mr. Williams' attempts to distribute, among others:

a. Excerpts from the "Frame of Government of Pennsylvania" by William Penn;

b. Excerpts from the Declaration of Independence;

c. Excerpts from various state constitutions;

d. A handout entitled "What Great Leaders Have Said About The Bible";

e. "The Rights of the Colonists" by Samuel Adams;

f. Excerpts from George Washington's journal;

g. Excerpts from John Adams' diary;

h. Excerpts from "The Principles of Natural Law" by Jean-Jacques Burlamaqui;

i. A handout entitled "Fact Sheet: Currency & Coins – History of 'In God We Trust.'"

True and correct copies of these handouts are attached as Exhibits B-J.

41. Mr. Williams intended to distribute these handouts to explain 1) the role of religion at the nation's founding; 2) the religious references in several founding documents including the Declaration of Independence; and

3) the reasons for the Establishment Clause in the First Amendment.

42. Principal Vidmar rejected the documents referenced in Paragraph 41 because of their religious content.

43. Approximately five percent of all of Mr. Williams' supplemental handouts distributed throughout the school year contain references to God or Christianity.

44. In November 2003, Mr. Williams taught a lesson on the origins of Thanksgiving.

45. In December 2003 and January 2004, Mr. Williams taught lessons on the origins of religious holidays, including Christmas, Ramadan, Diwali, Hanukah, and the Chinese New Year.

46. Principal Vidmar did not object to the lessons about Thanksgiving or the religious holidays.

47. In April 2004, Mr. Williams intended to teach a lesson about the religious holiday of Easter.

48. Principal Vidmar ordered Mr. Williams not to teach a lesson about Easter.

49. Principal Vidmar gave this order because Easter is a Christian religious holiday.

50. Mr. Williams is a Christian, and generally adheres to orthodox Christian beliefs as prescribed by the Bible.

51. One of Mr. Williams' Christian beliefs is that he must submit to governing authorities.

52. Mr. Williams understands and admits that he is not permitted to "proselytize" or seek to convert his students to Christian beliefs during instructional time.

53. Mr. Williams does not attempt to proselytize his students during instructional time.

54. Other than the religious references that occasionally occur in his lesson plans and supplemental handouts during the school year, Mr. Williams does not distribute religious material during instructional time.

55. Other than religious references that occasionally occur in his lesson plans and supplemental handouts, or in response to questions by students, Mr. Williams does not discuss religion during instructional time.

56. Mr. Williams has distributed his chosen handouts during previous school years without any problems.

57. Principal Vidmar is aware that Mr. Williams is a Christian.

58. At the beginning of the 2003-04 school year, Principal Vidmar communicated to Mr. Williams her concern that Mr. Williams would try to proselytize his Christian faith to the students in his classroom.

59. Mr. Williams communicated to Defendant Vidmar that, because of his religious belief regarding submission to authority, he does not attempt to proselytize his students during instructional time.

California State Law

60. California Education Code § 51511 states:

> Nothing in this code shall be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, dance, music, theatre, and visual arts or other things having a religious significance when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose and when such references or uses are incidental to or illustrative of matters properly included in the course of study.

61. On its face, California Educational Code § 51511 permits, *inter alia,* "religious literature" and "other things having a religious significance" as part of the school curriculum.

California's History-Social Science Content Standards

62. The California Department of Education has promulgated content standards for fifth grade curriculum taught in California public schools, including the District's schools.

63. The District's schools are required to educate fifth grade students according to the State's content standards.

64. The California Department of Education has published the content standards governing history and the social sciences as part of a book entitled "History-Social Science Framework for California Public Schools Kindergarten through Grade Twelve" ("Framework").

65. In that book, the History-Social Science Content Standards for Grade Five are entitled "United States History and Geography: Making a New Nation." A true and correct copy of these standards (including the cover pages of the Framework) is attached as Exhibit K.

66. The introduction to the History-Social Science Content Standards for Grade Five state: "This course focuses on one of the most remarkable stories in history: the creation of a new nation . . . founded on the Judeo-Christian heritage. . . ." Ex. K at 64.

67. This nation was founded on the Judeo-Christian heritage.

68. Standard 5.2.2 states "Explain . . . the reasons Europeans chose to explore and colonize the world (e.g., the Spanish Reconquista, the Protestant Reformation, the Counter Reformation)." *Id.* at 71.

69. Standard 5.4 requires that "Student understand the political, religious, social, and economic institutions that evolved in the colonial area." *Id.* at 72.

70. Standard 5.4.2 states: "Identify the major individuals and groups responsible for the founding of the various colonies and the reasons for their founding (e.g., . . . William Penn, Pennsylvania. . . .)." *Id.*

71. Standard 5.4.3 states: "Describe the religious aspects of the earliest colonies (e.g., Puritanism in Massachusetts, Anglicanism in Virginia, Catholicism in Maryland, Quakerism in Pennsylvania)." *Id.*

72. Standard 5.4.4 states: "Identify the significance and leaders of the First Great Awakening, which marked a shift in religious ideas, practices, and allegiances in the

colonial period, the growth of religious toleration, and free exercise of religions." *Id.*

73. Standard 5.5.1 states: "Understand how political, religious, and economic ideas and interests brought about the Revolution. . . . " *Id.*

74. Standard 5.7.6 states: "Know the songs that express American ideals (e.g., 'America the Beautiful,' 'The Star Spangled Banner')."

75. The Framework contains a list of "analysis skills" in conjunction with the content standards. Ex. K at 75.

76. The analysis skills under "Research, Evidence, and Point of View" require that:

> 1. Students differentiate between primary and secondary sources.
>
> 2. Students pose relevant questions about events they encounter in historical documents, eyewitness accounts, oral histories, letters, diaries, artifacts, photographs, maps, artworks, and architectures.
>
> 3. Students distinguish fact from fiction by comparing documentary sources on historical figures and events with fictionalized characters and events.

Id.

77. On their face, the California History-Social Science Content Standards require, *inter alia,* teaching about religion.

78. Appendix C of the Framework discusses teaching about religion in public schools. *Id.* at 203.

79. Appendix F of the Framework discusses the importance of using primary source documents. *Id.* at 214.

Cupertino Union School District Content Standards

80. The District has promulgated content standards for fifth grade curriculum taught in District schools.

81. Standard 4 under "United States History and Geography: Making a New Nation" requires that: "Students understand the political, religious, social, and economic institutions that evolved in the colonial era."

82. On their face, the District's content standards require, *inter alia,* that students receive objective instruction about religion.

Textbook Inadequacies

83. The District's textbook contains nothing about the Spanish Reconquista, the Protestant Reformation, or the Counter Reformation.

84. The District's textbook contains the following statements in its entire discussion about the Great Awakening: "The Great Awakening's goal was to strengthen people's religious beliefs and feelings. It widened the differences between several Protestant groups."

85. The textbook contains nothing on the religious ideas that motivated the Revolution or the religious origins of the concepts in the Declaration of Independence and the Bill of Rights.

86. The textbook contains nothing on the state constitutions' influence on the federal constitution.

87. These inadequacies, among others, are the reasons that Mr. Williams supplements the textbook with handouts in order to fulfill California's History-Social Science Content Standards.

VI.

STATEMENTS OF LAW

88. Each and all of the acts alleged herein were done by Defendants under the color and pretense of state law, statutes, ordinances, regulations, customs, usages, and policies of Cupertino Union School District, Santa Clara County, and the State of California.

89. Teachers do not shed their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

90. Teachers have academic freedom rights within the reasonable limits of the state's education content standards.

91. Defendants have a duty to set education policies and local content standards in accordance with the state's education content standards.

92. By their policy of excluding all of Mr. William's handouts containing religious references, Defendants have failed to meet their duty.

93. Unless and until the enforcement of the Defendants' religiously discriminatory policy is enjoined, the

Plaintiff will suffer and continue to suffer irreparable harm to his federal constitutional rights.

VII.

FIRST CAUSE OF ACTION – VIOLATION OF THE EQUAL PROTECTION CLAUSE UNDER THE UNITED STATES CONSTITUTION

94. The allegations contained in all preceding paragraphs are incorporated herein by reference.

95. The Equal Protection Clause requires that the government treat similarly-situated persons equally.

96. The Defendants allowed similarly-situated teachers to include religious expression in their lessons and supplemental handouts.

97. The Defendants do not require similarly-situated teachers to submit their lesson plans and supplemental handouts in advance.

98. The Defendants do not limit similarly-situated teachers' choices of supplemental handouts as they have limited Mr. Williams' choices.

99. The Defendants have treated Mr. Williams differently based on the exercise of his fundamental right to free speech.

100. Defendants have no compelling interest to justify their unequal treatment of Mr. Williams.

101. The Defendants' policy therefore violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

VIII.

SECOND CAUSE OF ACTION - VIOLATION OF THE RIGHT TO FREEDOM OF SPEECH UNDER THE UNITED STATES CONSTITUTION

102. The allegations contained in all preceding paragraphs are incorporated herein by reference.

103. Speech about religion is protected by the First and Fourteenth Amendments to the United States Constitution.

104. Speech about religion is necessary to fulfill the state teaching standards.

105. Defendants have excluded Mr. Williams' speech because of its religious content and viewpoint.

106. Specifically, Defendants have excluded the viewpoint that this nation has a Christian history.

107. By this exclusion, Defendants have, *inter alia*, limited Mr. Williams' academic freedom – his ability to speak and teach freely in accordance with the state educational standards.

108. Regardless of the type of forum (traditional, designated or limited, or nonpublic fora), the government may not discriminate based upon the viewpoint expressed by the speaker.

109. The Defendants have no compelling government interest to justify their discriminatory treatment of the Plaintiff.

110. The Defendants' actions therefore violate the Free Speech Clause of the First Amendment to the United States Constitution as incorporated and applied to the states under the Fourteenth Amendment.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

IX.

THIRD CAUSE OF ACTION – VAGUENESS

111. The allegations contained in all preceding paragraphs are incorporated herein by reference.

112. Defendants' policy and practice do not give adequate notice as to what conduct is prohibited.

113. Defendants' policy and practice vest unfettered discretion in school officials to control teacher speech based on its content and viewpoint.

114. Defendants' policy and practice contradict state law.

115. Defendants have no compelling interest to justify their policy and practice.

116. Defendants' policy and practice are therefore void for vagueness in violation of the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

X.

FOURTH CAUSE OF ACTION – VIOLATION OF THE ESTABLISHMENT CLAUSE UNDER THE UNITED STATES CONSTITUTION

117. The allegations contained in all preceding paragraphs are incorporated herein by reference.

118. The Defendants' policy and practice excludes Mr. Williams' religious expression.

119. The Defendants' policy requires that school officials systematically and regularly scrutinize historical documents to determine whether the officials consider the documents to have religious content that the officials consider impermissible within their school.

120. The Defendants' policy demonstrates impermissible hostility towards religion.

121. Defendants have no compelling interest that would justify their hostility towards religion.

122. The Defendants' policy therefore violates the Establishment Clause of the First Amendment to the United States Constitution as incorporated and applied to the states under the Fourteenth Amendment.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

XI.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

A. That this Court preserve the pre-litigation status quo by preliminarily enjoining the Defendants from ceasing their practice of allowing teachers to distribute curriculum-related supplemental handouts;

B. That this Court preliminarily and permanently enjoin the Defendants from enforcing their policy and practice of suppressing Mr. Williams' use of curriculum-related supplements on the basis that they contain religious content or references;

C. That this Court enter declaratory judgment stating that the Defendants' policy and practice is facially unconstitutional and violates the Plaintiff's rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution;

D. If the policy is not declared facially unconstitutional, that this Court enter a declaratory judgment stating that the policy is unconstitutional as applied to the Plaintiff and violates the Plaintiff's rights guaranteed under the First and Fourteenth Amendments to the United States Constitution;

E. That this Court award Plaintiff nominal damages arising from the acts of the Defendants as an important vindication of the constitutional rights at stake;

F. That this Court award Plaintiff his costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988 and other applicable law;

G. That this Court grant such other and further relief as the Court deems equitable, just, and proper;

H. That this Court adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment; and

I. That this Court retain jurisdiction of this matter as necessary to enforce the Court's orders.

Respectfully submitted on this, the 22nd day of November, 2004,

Attorney for Plaintiff,

By: /s/ Terry L. Thompson
Terry L. Thompson

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Respectfully submitted on this, the 22nd day of November, 2004.

By: /s/ Terry L. Thompson
Terry L. Thompson

VERIFICATION

I, Stephen J. Williams, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Complaint for Declaratory and Injunctive Relief and Damages and declare under the penalty of

perjury under the laws of the State of California that the foregoing is true and correct.

Dated this 28 day of October, 2004

/s/ Stephen J. Williams 6/20/04
Stephen J. Williams

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EXAMPLES OF HOSTILITY TO RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE

REPORTED CASES, MEDIA ARTICLES, UNREPORTED CASES, AND LAW REVIEW ARTICLES

(Some of these cases were resolved correctly, many not, but they all show the hostility to religious freedom currently ongoing nationwide)

- *From Lynn Lucas Middle School in Houston, Texas:*

  A schoolteacher trashed two students' Truth for Youth Bibles and took the students to the principal's office where she threatened to call Child Protective Services on their parents for permitting them to bring their Bibles. Later at the same school, different officials threw away students' book covers with the Ten Commandments, claiming the commandments were hate speech and could offend students.

- *Girl Barred from Singing 'Kum Ba Yah,'* Washington Post, Aug. 14, 2000 at A2.

  An eight-year-old girl was barred from singing "Kum Ba Yah" at camp in a talent show because the song included the words "My Lord." The camp director said, " . . . You have to check your religion at the door."

- Conrad deFiebre, *Suit Claims Man's Religious Freedom is Being Thwarted; A Revenue Employee Says He's Not Allowed to Display Signs on His Car or Cubicle,* Star Tribune (Minneapolis), July 2, 2004, at 3B.

  A Minnesota state Department of Revenue employee Alan Blackburn was barred from parking his car in the state parking lot because of religious and political stickers placed on the car (examples include: "God is a loving and caring God," "God defines marriage as a union between a man and a woman. He also says sex is to be enjoyed between a husband and wife only"). A lawsuit was filed in support of Blackburn's rights to place whatever stickers he wants on his car.

- Joan Little, *City Schools Issue Rules About Students, Religion,* The St. Louis Post-Dispatch, July 11, 1996.

  Elementary school student Raymond Raines was "caught" praying over his meal at school. He was lifted from his seat and reprimanded in front of all the other students. He was then taken to the principal who ordered him to cease praying in school.

STUDENTS

- *C.H. v. Oliva,* 226 F. 3d 198 (3d Cir. 2000).

  Zachary Hood brought his Beginner's Bible to school to share a story about Jacob and Esau called "A Big Family" as part of class activities, but Zachary's teacher refused to allow the story to be read because it was religious. Zachary's mom filed a lawsuit to allow Zachary to share his story just as the other students were permitted to share theirs.

- *Walz v. Egg Harbor Township,* 342 F.3d 271 (3d Cir. 2003).

  A pre-kindergarten student, Daniel Walz, was prevented from giving out pencils with the message "Jesus Loves the Little Children" engraved on them and later as a first grader was prevented from distributing candy canes with "The Candy Maker's Witness" attached to the candy. A lawsuit was filed to protect Daniel's rights to give gifts at school just like other children could, but the Third Circuit refused to uphold Daniel's rights to give his gifts and instead decided in favor of the school's discrimination.

- *Denooyer v. Merinelli,* 1993 U.S. App. LEXIS 20606 (August 3, 1993).

  When elementary student Kelly Denooyer was selected as her class' VIP of the Week, she brought a video of her singing a solo at church to share with her class. But the teacher refused to play the tape for a variety of reasons, including concern about the videotape's religious message. A lawsuit was filed to protect Kelly's rights, but the court determined that Kelly's free expression rights were not violated by the censorship of her video.

- *Settle v. Dickson County Sch. Bd.,* 53 F.3d 152 (6th Cir. 1995).

  Ninth grader Brittney Settle selected Jesus Christ as the topic for her open research project, but her teacher later refused to approve the subject and gave Brittney a zero for her grade and did not permit her to submit another project. A lawsuit was filed to protect Brittney's free expression rights, but the court refused to uphold Brittney's rights and found in favor of the school.

- *Westfield High Sch. L.I.F.E. Club v. City of Westfield,* 249 F. Supp. 2d 98 (D. Mass. 2003).

  A student started a religious club and wanted to hand out candy canes with a religious message at school. The school denied the students' permission and the students were suspended for distributing their candy canes. The students were forced to file suit in federal court in order to enforce their right to give candy to classmates without facing suspension.

- *Duran v. Nitsche,* 780 F. Supp. 1048 (E.D. Pa. 1991).

  Fifth grader Diana Duran was a member of the Academically Talented Program, where she was assigned an independent study project. She completed the project on the Power of God as originally approved by her teacher. However, when doing her research (including a student survey of classmates' religious beliefs) and attempting to present her project to the class (as part of the assignment), school officials intervened and prevented Diana from successfully completing the project. Diana along with her guardians filed a lawsuit to protect her First Amendment freedoms, but the court did not uphold her rights and upheld the school's action, saying she had no such rights in the classroom.

- *Hsu v. Roslyn Union Free Sch. Dist.,* 85 F.3d 839 (2d Cir. 1996).

  Students Emily and Timothy Hsu wanted to form a student Bible club at school, but were denied club recognition because the students insisted that the club have a policy permitting only Christians to serve as officers. A lawsuit was filed to protect the clubs' right to pick leaders in accordance with their faith. The court only permitted certain leadership positions to have a requirement relating to the member's faith

and would not permit all leadership positions to have such a requirement.

- *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)

  Through the Individuals with Disabilities Education Act (IDEA), a deaf student was entitled to access to a sign-language interpreter during the school day, so the student asked the Catalina Foothills School District to provide such an interpreter. The student attended Catholic school, and the district refused to provide an interpreter. A lawsuit had to be filed to uphold this religious student's rights.

- *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

  University of Utah acting student Christina Axson-Flynn withdrew from the acting program and left the university after her instructors heavily pressured her to perform scenes that required her to say profane words. Axson-Flynn was a Mormon and had informed the instructors of her religious objections to profane phrases during her audition for acceptance to the acting program.

- *From Northwest Elementary School in Massachusetts*

  Seven-year-old Laura Greska brought a book called *The First Christmas* to fulfill an assignment that asked students to share with the class about their family's Christmas traditions, but was forbidden from sharing it with the class because it was "religious" as it centered on Jesus Christ's birth.

- *From Walker County School District in Birmingham, Alabama:*

  Eleven-year-old Kandice Smith was told that she was not permitted to wear her cross to school because it would violate the dress code at Curry Middle School.

The dress code was devised to hinder gang activity at the school, and only after a lawsuit was filed did the school finally decided to incorporate an exception compatible with the Alabama Religious Freedom Amendment.

- *From Kettering City School District, Ohio:*

  A teacher prevented a kindergartener from giving out bags of jelly beans with a religious poem to classmates around Easter 2003. She was trying to uphold a school policy against students distributing religious literature in the classroom, though secular messages are permitted. A lawsuit was filed in U.S. District Court in Ohio.

- *From the Flagstaff, Arizona Unified School District:*

  Sixth-grader Caitlin Ribelin wanted to tell classmates about her church youth group, but her school principal prevented her from doing so because of school policies preventing distribution of religious materials not authored by students. A lawsuit had to be filed against the school district to allow religious literature to be treated the same way that secular literature is treated.

- *From Muskogee Public School District, Oklahoma:*

  An 11-year-old Muslim student was suspended for wearing her religious hair covering to school, in violation of the school's dress code. A lawsuit was filed to protect the student's religious rights in federal court in Oklahoma, and the school district finally decided to settle after the U.S. Department of Justice opened an investigation.

- *From Cushing Elementary School, Delafield, Wisconsin:*

  Morgan Nyman, an eight-year-old student was denied the opportunity to share the valentines that she had

made by hand with her classmates because the Valentines included religious messages, which would "violate the separation of church and state" if little Morgan was permitted to hand them out. A lawsuit was filed to protect Morgan's rights, and the Kettle Moraine School District only relented after litigation, deciding to allow Morgan to pass the valentines out.

- *From the Boulder Valley School District, Colorado:*

  For a class project, students were asked to select their favorite book for an oral book report. Eleven-year-old student Elizabeth Johnson selected the Bible, specifically Exodus, to share with the class, but the teacher rejected the student's choice, saying that the Bible may be "offensive" to some. Additionally, Elizabeth was told that she could not bring her Bible to school. An attorney became involved and sent a letter to the district explaining how Elizabeth's rights had been violated, and a television station contacted the school about the events. Twenty minutes after the news called, the district relented and permitted Elizabeth to select the Bible as the subject of her book report.

- *From Miami-Dade, Florida:*

  Students tried to distribute business-sized cards to other students on the Miami-Dade Community College campus; the cards had a number for people to call where they could hear a recorded message about Jesus Christ. Campus security officers approached and told the students that they couldn't pass out the cards. Later, the students returned to resume handing out their cards and were approached by security officers and an administration official. When the students tried to leave, more security officers were summoned as was a police officer who threatened to arrest the students. A lawsuit had to be filed to protect the students' rights, and the school was barred

from reviewing Christian literature and could prevent its distribution only in limited circumstances.

- *From Boca Raton School District, Florida:*

  Members of the Fellowship of Christian Athletes (FCA) were denied the opportunity to share a religious message on construction panels in the school as part of a beautification project. Though students were told that no profane or obscene messages were permitted, no policy was mentioned regarding religious messages. The students' messages were edited to eliminate "God" and "Jesus." A lawsuit was filed.

- *From Asa Adams School in Orono, Maine:*

  Third grader Gelsey Bostick wore a t-shirt and sweatshirt that said "Jesus Christ" on them, and her teacher asked her to turn both articles inside out because they were causing a commotion and offended one of the students. Furthermore, some students construed the words "Jesus Christ" as swear words. The school reversed itself only after a religious liberties law firm intervened.

STUDENT PRAYER

- *Goulba v. Sch. Dist. of Ripon,* 45 F.3d 1035 (7th Cir. 1995).

  After students recited the Lord's Prayer, on their own accord, before the opening of graduation ceremonies, student Nikki Goulba filed a civil contempt motion against the School District of Ripon and the Ripon High School principal, claiming that the officials violated a permanent injunction that prevented them from permitting prayer during school graduations.

- *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996).

  A lawsuit was filed challenging a school policy that permitted the graduating class to vote to determine if there would be student-led prayer during graduation ceremonies. The court struck down the policy, determining it violated the Establishment Clause and enjoined the school from permitting the prayer.

- *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).

  Lawsuit filed to challenge a school policy permitting high school seniors to use a popular vote to select a graduation speaker who could deliver a message of their choosing, without approval by school officials. The offense was that some students would use their time of speech to express religious thoughts.

- *Candler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

  A principal and student filed suit to challenge an Alabama statute, which allowed student-initiated prayer during school events.

- *Geardon v. Loudon County Sch. Bd.*, 844 F. Supp. 1097 (E.D Va. 1993) (mem.).

  Parents and students filed a lawsuit challenging prayer at a high school graduation, and the court permanently enjoined the school from permitting prayer at graduation ceremonies.

- *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

  A Clear Creek ISD parent filed suit to challenge a policy permitting high school seniors to select student volunteers to give nonsectarian, non-proselytizing invocations at graduation ceremonies.

- *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

  Two students brought suit challenging the practice of having a supper prayer at a military school in Virginia on the grounds that it violated the Establishment Clause and the court struck down the practice.

- *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

  A lawsuit was filed to challenge a school district policy permitting student-led, student-initiated prayer prior to football games, and the court struck down the policy, determining it violated the Establishment Clause. In the lower court in this same case, the judge ordered students not to pray in Jesus' name and told them that federal marshals would be on hand to take students to the Galveston County Jail, saying "Anyone who violates these orders, no kidding, is going to wish that he or she had died as a child when this court gets through with it."

- *Lee v. Weisman*, 505 U.S. 577 (1992).

  In Providence, Rhode Island, principals of public school were permitted to ask clergy to give invocations and benedictions at graduation exercises, but when a middle school principal invited a rabbi to give a nonsectarian prayer, a student's parent got a temporary restraining order to prevent the prayer and sought a permanent injunction to prevent the practice of inviting clergy to perform prayers in the future.

- *Wallace v. Jaffree*, 472 U.S. 38 (1985).

  A lawsuit was filed to challenge the practice of having a period of meditation and voluntary prayer in schools in Alabama.

- Frank J. Murray, *Federal Court Hears Lawsuit Over Kindergarten Christian; New York Schools May*

Relent, May Let Tot Say Grace at Meals, The Washington Times, April 12, 2002.

Kindergartner Kayla Broadus prayed, "God is good. God is great. Thank you, God, for my food," with two classmates at her school in Saratoga Springs, New York at the snack table before they ate their snack. Her teacher silenced the prayer, scolded Kayla and informed the school lawyer. A lawsuit ensued over the child's prayer.

- *From Aledo Independent School District, Aledo, Texas:*

  Katherine Furley was elected to pray at her graduation ceremony, but then was ordered to submit her prayer to officials. School officials then proceeded to edit, word by word, which words she could and could not pray. A lawsuit was filed to protect Katherine's right to pray without being edited by the government. The Court ruled against her right to pray without government editing.

- *From Norfolk High School, Nebraska:*

  After graduating seniors voted to have prayer in their graduation, a student complained to the ACLU, who threatened legal action against the school if they permitted the prayer. At the graduation ceremony, school officials announced that there would be no praying during the ceremony.

SCHOLARSHIP AWARDS AND VOUCHERS

- *Locke v. Davey,* ___ U.S. ___, 124 S. Ct. 1307 (2004).

  Josh Davey received a Promise Scholarship, which was awarded to academically gifted students with postsecondary education expenses, to use at any college in the state. He decided to pursue a double major in pastoral ministries and business management/administration.

Davey was told that he could use the scholarship for any major unless he was devoted to become a pastor. The Court ruled against him.

- *Eulitt v. Me. Dep't of Educ.,* 307 F. Supp. 2d 158 (D. Me. 2004).

  Though Maine state law requires free public education for kindergarten through 12th grade, the town of Minot only has schooling through the eighth grade, and the town has contracted to send their students elsewhere for high school, public school or other schools if the student has "educational program requirements that may not be offered in association with PRHS." A Minot family was denied access to public funding for child's tuition to Catholic high school, despite the fact that the state had the authority to approve payments to alternative schools, and a lawsuit was filed.

- *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

  An Ohio voucher program was enacted because the public school system was in a "crisis of magnitude," and families were given voucher funds to use toward a school of their choosing. Many families elected to use their vouchers for religious schools, and as a result, a lawsuit was filed to challenge the program, claiming it established religion.

- *From Michigan:*

  A Cornerstone University graduate student received a tuition grant from the state of Michigan. But when the student decided to pursue a Pastoral Studies divinity degree, the financial aid office of the university informed him that he was no longer eligible for the grant because it could not be used for divinity, theology, or religious instruction. In other words, religious

studies were being treated differently than other areas of study.

SCHOOL FACULTY AND OTHER STATE EMPLOYEES

- *Barrow v. Greenville ISD,* 332 F.3d 844 (5th Cir. 2003).

  Karen Jo Barrow was denied an assistant principal position because she refused to remove her children from private, Christian school. A lawsuit was filed to protect her rights to select a religious education for her children without suffering repercussions for it at work in the public schools. Though the district court refused to uphold Barrow's parental rights to send her children to Christian school, the Fifth Circuit did and warded off this egregious religious discrimination on the part of the school district.

- *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (3d Cir. 1999).

  Two Muslim police officers in Newark were required to shave their beards after the city issued an order requiring all police officers to be clean shaven. The order permitted a medical exemption, but not a religious exemption. The officers had to file a lawsuit to protect their constitutional right to free exercise of their religion.

- *Nichol v. Arin Intermediate Unit 28,* 268 F. Supp. 2d 536 (W.D. Pa. 2003).

  The school district suspended an elementary school instructional assistant Brenda Nichol for wearing a cross necklace, finding her in violation of a district policy based on the Pennsylvania's Garb Statute, which prohibited teachers and other public school employees from wearing religious emblems or insignia.

A lawsuit was filed to remedy the policy, which was overtly and openly hostile to religion, and to prevent the district from forbidding symbolic speech by employees from a religious viewpoint.

- *Peloza v. Capistrano Unified Sch. Dist.,* 37 F.3d 517 (9th Cir. 1994).

  The Capistrano Unified School District forbade John Peloza, a biology teacher, from discussing religious matters with students the entire time he is on the school campus, even if the discussion occurs outside of class time and is student-initiated. Essentially the district had a history of reprimanding and harassing Peloza because of his worldview. Peloza filed suit to protect his constitutionally-protected free speech and equal protection rights, but the court dismissed Peloza's complaint finding that the school district's interest in avoiding an (unlikely) Establishment Clause violation trumped Peloza's rights.

- *Roberts v. Madigan,* 921 F.2d 1047 (10th Cir. 1990).

  Mr. Roberts' class had a silent reading period daily, and Mr. Roberts had a library of 239 books, from which the students could select reading material. Two of the books dealt with Christianity. Mr. Roberts participated in the reading period, often choosing to read his Bible, and he kept the Bible on his desk during the school day. The school principal censored Mr. Roberts, forbade him from placing his Bible on his desk during the school day and from reading it during the school day, and forbade him from keeping the two Christian books in the library. A lawsuit was filed to end the religious bigotry against Mr. Roberts, but the court upheld the school's action and even awarded the school district court costs.

- Diane Lynne, *Petition Posted to Defend 'God Bless America,'* WorldNetDaily, Jan. 31, 2003.

  Military honor guardsman Patrick Cubbage was fired for saying "God bless you and this family, and God bless the United States of America" to families as he presented a folded flag in honor of a fallen veteran. Though the families did not object to the practice, Cubbage's co-guardsmen complained to their supervisor, and Cubbage was warned not to say the blessing to the families. Later Cubbage gave the blessing to family after a request from the fallen veteran's son, and shortly thereafter Cubbage was fired for giving the blessing.

- Jeremy Gray, *Man Fired Over Lapel Pin Garners Support,* The Birmingham News, June 27, 2004, News.

  The Hoover Chamber of Commerce fired employee Christopher Word because he wore a Ten Commandments lapel pin.

- Bill McAllister, *Gearing Up for Christmas,* Washington Post, Sept. 29, 1995, at N66. The Post Office issued guidelines advising clerks to use words like "Happy Holidays" and to avoid any decorations with a religious theme.

- *From Logan, Kentucky:*

  A public library policy prevented employees from wearing religiously-oriented jewelry, and an employee was fired for wearing a cross. A lawsuit was filed to protect the employee's right to free speech and religious freedom.

- *From Honolulu, Hawaii:*

  Honolulu city employee Kelly Jenkins was prohibited from posting religious literature, like an invitation to his church, in common areas of the employee break

room and employee bulletin boards because of "separation of church and state" concerns. A lawsuit had to be filed to protect Jenkins' rights.

REGULAR CITIZENS

- Jeffrey Spino, *Banned Yarmulke Leads to Judicial Conduct Commission Complaint,* Texas Lawyer, Sept. 30, 1996, at 5.

  Judge Patricia Lykos ordered a Jewish attorney Gil Fried to remove his yarmulke in Texas Court when he was serving as an expert witness.

- *From Vermont:*

  Nancy Zins attempted to purchase specialty plates in Vermont for herself and for her husband with the messages "ROMANS8" and "ROMANS5" on the plates, but her request was denied by the Vermont DMV, which claimed that the messages may be offensive. After first going through the Agency of Transportation, a lawsuit was filed to protect her free speech rights and her ability to select a message for her license plate just as other non-religious citizens are free to do.

- *From Northglenn, Colorado:*

  A coach shared his faith as he coached swimming in the city recreation facility. The city recreations director sent the coach a letter, informing him that he was no longer welcome on the premises of the city recreation facility. A concerned parent inquired to the city to find out why the coach had been banned and was told that the coached used offensive language. Upon further investigation, the parent discovered that the coach's preaching was the problem. A lawsuit was

filed to protect he [sic] man's rights to access the city recreation facility.

IN THE SCHOOLHOUSE

- *Fleming v. Jefferson County Sch. Dist. R-1,* 298 F.3d 918 (10th Cir. 2002).

  Columbine High School hosted a tile-painting project, so students could express themselves following the school's tragedy. Some students expressed themselves with religious symbols, including a victim's sister who incorporated a small yellow cross in her tile design. After the tiles were posted, the school officials eradicated the religious symbols from the tile display, so a lawsuit was filed to prevent the school officials from censoring the religious expression of the students. Unfortunately, the court chose not to uphold the students' expression rights and instead validated the school's censorship.

- *Demmon v. Loudoun County Pub. Sch.,* 279 F. Supp. 2d 689 (E.D. Va. 2003).

  For a school fundraiser, people could purchase bricks and have text and symbols inscribed on the bricks to be used in a sidewalk surrounding the school's flagpole, and some purchasers elected to have a Latin cross inscribed. A parent complained about the crosses, so the school district removed all the crosses. A lawsuit was filed to protect the religious expression from censorship.

- *Selman v. Cobb County Sch. Dist.,* 2004 US Dist. LEXIS 5960 (N.D. Ga. 2004).

  A Georgia School District decided to place a sticker in new science textbooks explaining that evolution was a theory, not a fact, and encouraging students to study

with open minds and critical thinking skills. But a handful of parents complained that the sticker restricted teaching evolution and promoted creationism and filed a lawsuit to prevent its use, under the guise that such a sticker violated the Establishment Clause.

- *Good News Club v. Milford Central School,* 533 U.S. 98 (2001).

  The Milford Central School denied the Good News Club use of the school's facilities after school. A lawsuit was filed to protect the religious group's right to use the school's facilities just like other organizations could, without being discriminated against because it is a religious group. The case had to go all the way to the Supreme Court before the religious group was vindicated because the lower courts both upheld the school's unlawful religious discrimination.

- *Widmar v. Vincent,* 454 U.S. 263 (1981).

  The University of Missouri at Kansas City refused to allow a religious student group access to university facilities as other student groups were permitted to do. The students were forced to file a lawsuit in order to protect their rights to equal access. They simply desired for their religious organization to be afforded the same rights as other student organization [sic].

- *Wigg v. Sioux Falls Sch. Dist.,* 274 F. Supp. 2d 1084 (D.S.D. 2003)

  A school district refused to allow a teacher to participate in a Good News Club meeting at the school after school hours, so the teacher filed suit to protect her rights to assemble with the religious group. The court only partially protected her rights, ruling that she could attend Good News Club meetings, but arbitrarily determined that she only had the protected right

to participate in meetings at schools other than where she taught.

- *Bd. of Educ. v. Mergens,* 496 U.S. 226 (1990).

  The school board refused to allow students to form an extra-curricular Christian club, claiming such a club would violate the Establishment Clause, despite the fact that various other clubs met at the school. A lawsuit was filed to protect a Christian group from being unlawfully discriminated against by a school board.

- *Ceniceros v. Bd. of Trs. of the San Diego Unified Sch. Dist,* 106 F.3d 878 (9th Cir. 1997).

  The school district refused a religious club the opportunity to meet during non-instructional lunchtime, though other groups could. A lawsuit was filed on behalf of the students to prevent the district's unlawful discrimination and to uphold the students' rights under the Equal Access Act. The case went to the Ninth Circuit before the students were finally afforded their constitutional protection.

- *Edwards v. Aguillard,* 482 U.S. 578 (1987).

  A suit was filed to challenge Louisiana's Creationism Act. The Creationism Act provided that if evolution is taught in public schools, creation science must also be taught. And if creation science is taught, then evolution must be taught as well. The suit sought to strike down the act under the guise that it violated the Establishment Clause, and the Supreme Court obliged, striking down the Creationism Act.

- *Bauchman v. West High Sch.,* 132 F.3d 542 (10th Cir. 1997).

  A school choir's repertoire included Christian music and occasionally sang at a church, and a Jewish choir student's family filed a lawsuit, essentially asking the

court to censor the choir from singing any religious music. The case reached the Tenth Circuit before the unlawful religious censorship threat was abated.

- *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995).

  The University of Virginia denied a student journal funding from the school's student activity fund because of the journal's religious viewpoint. The student filed a lawsuit to challenge the guidelines for disbursement of student activity funding because the guidelines were used to discriminate religious viewpoints. The student filed a lawsuit and had to go all the way to the Supreme Court just to have their constitutionally-guaranteed rights upheld.

- *Chandler v. James,* 985 F. Supp. 1068 (D. Ala. 1997).

  Plaintiffs ("civil liberties activists") filed a lawsuit and succeeded in permanently enjoining school board and public officials from accommodating religious activity in schools. The court determined that the school officials' behavior had violated the Establishment Clause because they permitted prayer at school functions, excused students from school for baccalaureate services, and permitted religious study with non-school persons during school hours.

- *Child Evangelism Fellowship v. Montgomery County Pub. Schs.,* 2004 U.S. App. LEXIS 13487 (4th Cir. 2004).

  The Montgomery County Schools refused to allow the Child Evangelism Fellowship (CEF) to participate in the district's take-home flyer forum to distribute flyers about the Good News Club, citing fears about the separation of church and state. A lawsuit was filed to protect the rights of CEF to participate in the flier program just as other organizations were permitted to

do and to force the school district to cease the religious discrimination.

- *Child Evangelism Fellowship of New Jersey v. Stafford Township,* 233 F. Supp. 2d 647 D.N.J. 2002).

  A religious organization was denied permission to post fliers, pass fliers out, staff tables at back-to-school-night or allow students to pass materials to other students about a religious club forming in schools. A lawsuit was filed to protect the right of a religiously-affiliated organization to utilize the same forums that were afforded to other groups and to prevent the school board from discriminating based on a religious viewpoint.

- *Daugherty v. Vanguard Charter Sch. Acad.,* 116 F. Supp. 2d 897 (W.D. Mich. 2000).

  Parents of children attending the Vanguard Charter School Academy claimed that the school violated the Establishment Clause because a mom's prayer group met in the parent room, teachers and staff prayed (on their own accord) on school property, religious materials were distributed in student's folders (a content neutral forum), and the school taught morality. These parents filed a lawsuit to prevent the school from permitting the religious activity at the school.

- *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

  A student and her father filed a lawsuit because the school permitted employees to be involved with student prayer after basketball games, permitted the choir to use a Christian song as its "theme song" and permitted the distribution of Gideon Bibles to fifth grade classes. The court upheld the right of the choir to sing the religious song but struck down the employees'

involvement with prayer, determining that such an exercise violated the Establishment Clause.

- *Mitchell v. Helms,* 530 U.S. 793 (2000).

  Under the Education Consolidation and Improvement Act of 1981, government aid for materials and equipment was provided to public as well as private schools. A lawsuit was filed by parties claiming the law violated the Establishment Clause simply because private schools, including religious schools, received a benefit from the act, which the parties claimed served as an establishment of religion.

- *Peck v. Upshur County Bd. of Educ.,* 155 F.3d 274 (4th Cir. 1998).

  A school board policy permitted religious groups to provide religious materials and Bibles to students on one designated day each school year, but a lawsuit was filed to strike down the policy.

- *Powell v. Bunn,* 185 Ore. App. 334 (Or. Ct. App. 2002)

  An Oregon school district allowed the Boy Scouts to present information on membership to students, but a parent filed suit, challenging the policy on the grounds that it violated the Establishment Clause.

- *Rusk v. Crestview Local Schs.,* 220 F. Supp. 2d 854 (N.D. Ohio 2002).

  School permitted non-profits, including religious non-profits, to submit flyers to the school for distribution to the students' mailboxes, and a parent filed a lawsuit, objecting to the religious groups being able to submit flyers, even though the flyers did not advocate the religion and were not proselytizing. The court halfheartedly upheld the religious groups' rights to utilize the mailbox distribution, but the court only permitted the groups to distribute certain messages

and censored information relating to a religious or sectarian event.

- *Skoros v. City of New York,* 2004 U.S. Dist. LEXIS 2234 (E.D.N.Y. 2004).

  A Catholic parent objected to policy of excluding a Creche from New York City Schools' holiday displays while permitting Menorahs, the Star and Crescent and Christmas Trees. A lawsuit was filed to remedy the exclusion of the Creche. The court determined that it was appropriate to exclude the Creche as it was still a religious symbol while the others had become secularized and that a child would not perceive an endorsement of the Judaism or Islam or disapproval of Christianity.

- *Washegesic v. Bloomingdale Public Schs.,* 33 F.3d 679 (6th Cir. 1994).

  A portrait of Jesus Christ hung in a hallway of a school, and a former student filed suit against the school, asserting that the portrait was an Establishment Clause violation, and the court agreed and decided that the picture must be removed.

- Lisa Falkenberg, *Policy Involving Evolution Prompts Federal Inquiry,* Associated Press, Jan. 29, 2003, BC cycle.

  The story details how Texas Tech professor Michael Dini discriminated against students on the basis of their religion, and the university stood behind the professor saying the professor's policies were not in conflict with those of Texas Tech.

- Ryan McCarthy, *School Rallies to Retain Sigh* [sic]*; The ACLU Says the Message 'God Bless America' Divides Kids by Religion and is Unconstitutional,* The Sacramento Bee, Oct. 6, 2001.

  In the wake of Sept. 11, 2001, Breen Elementary School in Rocklin, California had a sign posted that said 'God Bless America,' and the ACLU intervened in an attempt to have the sign removed, calling it a clear violation of the U.S. and California constitutions and divisive.

- Barbara Vobejda, *School Officials' Weigh Sachs' Ruling on Religious Gatherings,* Washington Post, Dec. 8, 1984, B3.

  Maryland Attorney General Stephen H. Sachs ruled that Catonsville High School students could continue their informal religious activity of gathering to read the Bible during their Thursday lunch hours. School administrators were worried about the ruling because they feared it would create problems in a "sensitive area." Additionally, in Prince George's County school administrators renamed Christmas trees and Christmas pageant, holiday trees and holiday pageant respectively.

- *From Oswego County, New York:*

  The Mexico Academy High School decided to start removing bricks that had been purchased and inscribed as part of a school fundraiser if the brick contained a Christian message. A lawsuit had to be filed to protect the free speech and equal protection rights of citizens who had purchased the bricks and to prevent the religious censorship.

- *From Crosby-Ironton High School in Crosby, Minnesota:*

  The Crosby-Ironton High School censored the Lunch Bunch, a Christian group, from using flier to describe their group and to promote the See You at the Pole event. A lawsuit was filed to protect the students' rights, the same rights afforded to other student organizations.

- *From Los Angeles Unified School District:*

  The Los Angeles Unified School District tried to force a "Good News Club" to pay fees to utilize school facilities, but did not require fees from the Boy Scouts or the YMCA. A law suit was filed, seeking to grant religious groups equal access to school facilities.

- *From Montgomery County Public Schools, Maryland:*

  A school policy prevented students from receiving credit for their religious community service to fulfill the 60-hour community service graduation requirement. Students who worked at a Vacation Bible School on an Indian Reservation were not permitted to count that time toward their hourly requirement. Attorneys intervened and the students were permitted to count the hours, but, unfortunately, the policy remains and continues to discriminate against students who participate in religiously-based community service.

- *From Dillon, Montana:*

  Motivational speaker Jaroy Carpenter was prevented from speaking at an assembly in the Dillon Middle School because he was an evangelical Christian and affiliated with the Dawson McAllister Association. He was prevented from speaking despite the fact that he had previously spoken in over 200 secular schools, and he agreed to omit discussions of his religious faith and references to a youth rally being held nearby. A lawsuit was filed to protect Carpenter's rights.

- *From Carl Sandburg Community College, Indiana:*

  Cosmetology teacher Louise Piggee was reprimanded severely and denied a contract renewal after she shared some religious literature outside of the classroom with

  a student with whom she had developed a relationship. A lawsuit was filed.

- *From Reno, Nevada:*

  School officials sought to prevent a Bible club from disturbing candy canes with the message "Jesus Loves You" attached to it.

- *From Northville High School in Michigan:*

  A Bible club was told it would have to meet before or after school and not during seminar period as other groups are permitted to do because of the religious nature of the group. Bible club members filed suit to protect their right to meet without being discriminated against because their groups was [sic] religious.

- *From Panama City, Florida:*

  A school principal changed the name of the Bible Club from Fellowship of Christian Students to Fellowship of Concerned Students without conferring with student members.

- *From Beaumont Independent School District, Texas:*

  The superintendent started a "clergy-in-schools" program, which allowed clergy to mentor students, but the Americans United for Separation of Church and State filed suit seeking to strike down the program.

- *From South Tama Community School District, Iowa:*

  The community center denied the Fellowship of Christian Athletes (FCA) access to facilities, so an FCA member complained and a demand letter was sent to the school district, informing them of the situation. Only then, did the school district back down and change their policy to stop discriminating against religiously affiliated groups.

- John M. Hartenstein, *A Christmas Issue: Christmas Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion*, 80 Calif. L. Rev. 981 (1992).

RELIGIOUS HOLIDAY OBSERVATION

- *Metzl v. Leininger,* 57 F.3d 618 (7th Cir. 1995).

  A teacher filed suit in objection to teachers being permitted to take Good Friday off with pay, claiming the practice violated the Establishment Clause.

- *Bridenbaugh v. O'Bannon,* 185 F.3d 796 (7th Cir. 1999).

  A citizen filed suit to challenge the Indiana policy of giving state employees Good Friday as a day off with pay, claiming that the policy established religion.

- *Freedom From Religion Foundation v. Thompson,* 920 F. Supp. 969 (W.D. Wis. 1996) (mem.).

  Anti-religion group filed suit to challenge a Wisconsin statute that recognized Good Friday as a holiday, claiming that designating Good Friday as a holiday violates the Establishment Clause. The court agreed, finding that the Establishment Clause was violated.

- *From Garden City Long Island, New York:*

  Teachers in Garden City Long Island wanted to use personal days to observe religious holidays, which is one of listed permissible uses for a personal day, but when some Catholic teachers requested to use a personal day for Holy Thursday and some Jewish teachers wanted to use a personal day during Passover, they were denied and were forced to go to arbitration to prevent the religious discrimination.

EQUAL ACCESS, CHURCH AND RELIGIOUS GROUP DISCRIMINATION

- *Bronx Household of Faith v. Bd. of Educ.,* 331 F.3d 342 (2003).

  The Bronx Household of Faith filed suit to prevent the New York public schools from discriminating against churches. The public schools refused to allow churches to use school facilities, but permitted other community groups to have access. The church brought suit so it could be treated just like any other community group wanting to use the facility.

- *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah,* 508 U.S. 520 (1993).

  The Church of the Lukumi Babalu Aye sought to set up a church in Florida; the church practices Santeria, a religion which incorporates animal sacrifice into its religious practices. Upon hearing of the church's plan to develop a church in the city, the city counsel held an emergency meeting and passed ordinances which would prevent the church from practicing the animal sacrifice, an essential part of the church's free exercise. A lawsuit was filed to protect the church's right to free exercise.

- *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).

  A New York school board denied a church after-hours access to a school to exhibit a film series about Christian family values because of a policy prohibiting use by any group for religious purposes. A lawsuit was filed to protect the church's right to have access to the school premises. The church should not be treated like a second-class citizen because it is religious.

- *Liberty Christian Center v. Bd. of Educ.,* 8 F. Supp. 2d 176 (N.D.N.Y 1998).

  A suit was filed after the Board of Education of Watertown, New York denied the Liberty Christian Center (LCC) access to the Watertown High School Cafeteria during non-school hours. A lawsuit was filed to prevent the Board from discriminating against a religious group and denying its rights to equal access.

- *Amandola v. Town of Babylon,* 251 F.3d 339 (2d Cir. 2001).

  Pastor John Amandola's church Roman Chapter Ten Ministries, Inc. had obtained a permit to use the Babylon's Town Hall Annex to hold worship services, but when an angry resident called the city to complain about the facilities being used for church services, the town revoked the permit. The church filed suit to protect their right to access the community facilities and to end the religious bigotry.

- *Church on the Rock v. City of Albuquerque,* 84 F.3d. 1273 (10th Cir. 1996).

  City prevented senior citizens groups from presenting a Jesus video, giving Bibles away or having sectarian instruction and religious worship at the senior center. So, a lawsuit was filed to challenge the city's policy, which was unconstitutionally restricting religious expression.

- *Ehlers-Renzi v. Connelly Sch. of the Holy Child,* 224 F.3d 283 (4h Cir. 2000).

  An ordinance in Montgomery County, Maryland accommodated churches by exempting them from acquiring a special permit before constructing a school on church property, but a lawsuit was filed in an attempt to strike down the law.

- *Ford v. Manuel,* 629 F. Supp. 771 (N.D. Ohio 1985).

  The Findlay Board of Education permitted the Findlay Weekday Religious Education Council to operate before and after school hours in the public schools in accordance with "Community Use of School Facilities," but parent-taxpayers complained about the program because of concerns regarding the Establishment Clause and filed a lawsuit in hopes of striking down the program.

- *Moore v. City of Van,* 238 F. Supp. 2d 837 (E.D. Tex. 2003) (mem.).

  The City of Van had an unwritten policy of refusing to permit a group to access the Van Community Center if the use was for a religious purpose, so citizens seeking to use the center for religious purposes filed suit to protect their rights and to prevent the city from having policies that discriminate against religious groups.

- *From New York City:*

  A New York City pastor wanted to use the Woodside Community Center, located in a public housing development, to host a Bible study for New Yorkers following the attacks on September 11, 2001. The pastor was denied his request because religious services (unless connected to a family oriented event like a wedding) were prohibited. A lawsuit was filed to prevent the community center from treating religious groups differently than other groups.

- *From the Church of Christ in Hollywood, California:*

  Former church member Lady Cage-Barile began to intimidate and harass members of the church and interrupt and disrupt Bible studies, so the church informed her she was no longer welcome on church property. When the church sought an order barring

Cage-Barile, the court denied it, and the church was forced to go to the California Court of Appeals to enforce its right to exclude trespassers from church premises.

- *From Mitchell County, Texas:*

  The public library in Mitchell County, Texas tried to deny Rev. Seneca Lee access to a room to hold a meeting about political and social issues from a Christian Perspective because of a library policy that prevented religious groups from using the meeting room. After a lawsuit was filed, the library changed their policy of discriminating against religious groups.

- *From Plano, Texas:*

  The city of Plano attempted to prevent the Willow Creek Fellowship from opening because of the slant of the roof, despite the fact that no ordinance existed relating to the angle of the room and despite the fact that a school just down the street from the church had an identical angle. Only after threat of a lawsuit did the city relent and permit the church to open.

- *From Cassadaga, Florida:*

  A church was refused zoning approval for a church after they had purchased land outside of Cassadaga, which was a violation of Religious Land Use and Institutionalized Persons Act (RLUIPA). A lawsuit was filed in Federal Court, and the county settled, ending the lawsuit and permitting the church to locate in Cassadaga.

- *From the Dallas Independent School District in Texas:*

  Reunion Church had leased an empty high school on Sunday morning for services, but the school district evicted the church in the middle of the lease, citing the "separation of church and state." A lawsuit was

filed to protect the church's equal access, and the school district changed their policy to grant religious groups the same treatment as non-religious organizations.

- *From the Cave Creek School District, Arizona:*

  The Cave Creek public school district passed a policy allowing non-profit community groups to meet in public schools without charge, but the policy excluded churches. A church was charged $1,200 under the policy to access the school. An attorney got involved to explain the constitutional issues associated with the policy and to request records under the Freedom of Information Act to determine how much the school had charged other groups during the previous three years. As a result of the intervention, the school district decided to revise the discriminatory policy and also decided to reimburse the church for their moneys.

- *From Lebanon, Indiana:*

  A minister and a church member from Grace Baptist Church were prohibited form distributing religious literature in a public park, though the minister had distributed materials for years in the park. A lawsuit was filed to protect the minister's rights.

- *From Ontario, California:*

  The Church of the Light bought some land in Ontario after determining that the property was zoned so that it could contain religious assembly. However, the city passed an ordinance requiring new churches to obtain a permit before building, and five days after the ordinance was passed, Ontario's Development Advisory Board denied the church's permit applications, claiming the denial was because if [sic] allegations that the

church was a cult. A lawsuit was filed to protect the church's rights to build their church.

- *From Balch Springs, Texas (Barton v. City of Balch Springs):*

  Senior citizens were told to stop their 20-year-old practices of praying before their meals, having an inspirational religious message, and singing gospel songs in their Senior Citizens Center because of a new city policy banning religion in public buildings. A lawsuit was filed to defend the seniors' rights.

- *From Dunedin Public Library in Tampa, Florida:*

  The Liberty Counsel was denied access to the library's community meeting room for a meeting relating to America's Christian History and the influence of the Ten Commandments, a historical presentation from a religious perspective, which was open religious viewpoint discrimination.

- *From San Fernando Valley, California:*

  The Child Evangelism Fellowship (CEF) applied to the Los Angeles Unified School District to use the Chase Street Elementary School in Panorama City to host a Good News Club. The school policy permitted use by civic and community groups, but prevented use by "sectarian of denominational religious exercises or activities." So, the CEF applied through the Real Estate branch and was willing to pay application and rental fees, which is not required of all other groups, but CEF was still denied. A lawsuit was filed to gain equal access for the religious group and to prevent the school district's religious discrimination.

HOLIDAY DISPLAYS

- *ACLU of NJ v. Township of Wall,* 246 F.3d 258 (3d Cir. 2001).

  The ACLU, along with some citizens, filed a lawsuit to challenge a holiday display consisting of a crèche with traditional figures, a lighted tree, urns, candy cane banners, a menorah, and signs commenting on celebrating diversity and freedom as well as wishing passer-bys Merry Christmas and Happy Hanukkah.

- *Amancio v. Town of Somerset,* 28 F. Supp. 2d 677 (D. Mass. 1998).

  Somerset resident filed a lawsuit challenging Somerset's Christmas display, which includes a Nativity crèche, holiday lights, a wreath, a Christmas tree and a plastic Santa Claus. The display had been a Somerset tradition for 60 years.

- *Lynch v. Donnelly,* 465 U.S. 668 (1984).

  Pawtucket, Rhode Island has an annual Christmas display in the city's shopping district, which is owned by a nonprofit, and it includes a Santa house, Christmas tree, a "Seasons Greetings" banner, and a crèche, which had been a staple of the display for over 40 years. A lawsuit challenged the display and specifically the inclusion of the crèche.

- *ACLU v. City of Birmingham,* 791 F.2d 1561 (6th Cir. 1986).

  The ACLU filed suit to expel a crèche from the annual holiday display at city hall, claiming it violated the Establishment Clause.

- *ACLU of New Jersey v. Schundler,* 168 F.3d 92 (3d Cir. 1999).

  The ACLU filed suit to challenge a holiday display, which included a crèche and a menorah, claiming the display violated the Establishment Clause.

- *ACLU of Kentucky v. Wilkinson,* 701 F. Supp. 1296 (E.D. Ky. 1988).

  The ACLU filed suit to challenge a nativity scene on the Kentucky Capitol, seeking an injunction preventing the continued use of the nativity scene, claiming the nativity scene was an endorsement of religion.

- *ACLU v. City of Florissant,* 186 F.3d 1095 (8th Cir. 1999).

  The ACLU filed suit to challenge a holiday display at the city Civic Center in Florissant, Missouri on behalf of a resident who was offended by the inclusion of the crèche in the holiday display.

- *ACLU of New Jersey v. Schundler,* 104 F.3d 1435 (3d Cir. 1997).

  The ACLU along with some citizens filed suit challenging a holiday display containing a crèche and a menorah on city hall property.

- *Americans United for Separation of Church and State v. City of Grand Rapids,* 1992 U.S. App. LEXIS 7513 (6th Cir. 1992).

  Americans United filed suit to prevent a menorah from being placed on Calder Plaza in Grand Rapids during the Chanukah celebration, claiming the placement of the menorah established religion. The court struck down the display, determining that the city appeared to be endorsing religion because of the display.

- *Calvary Chapel Church, Inc. v. Broward County,* 299 F. Supp. 2d 1295 (S.D. Fla. 2003).

  Broward County, Florida hosts the Holiday Fantasy of Lights in a public park as a city fundraiser. A church wanted to contribute to the event and have a display that included the words, "Jesus is the Reason for the Season," but the city refused to allow it. The church filed a lawsuit in order to protect their constitutional rights to participate in the city event without having their message being censored because it was religious.

- *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753 (1995).

  The board responsible for regulating the Ohio State Capitol Square refused a permit to a group wanting to display a cross during the 1993 Christmas season, so a lawsuit was filed.

- *Comty. for Creative Non-Violence v. Lujan,* 908 F.2d 992 (D.C. Cir. 1990).

  The Park Service has hosted a "Christmas Pageant of Peace" on White House grounds since 1954 and includes the pageant included the National Christmas Tree, a Nativity Scene, and live reindeer. The Park Service declined to includ a sculpture from the Community for Creative Non-Violence, and the Community filed suit.

- *County of Allegheny v. ACLU,* 492 U.S. 573 (1989).

  The ACLU challenged a holiday display, and the Supreme Court held that a menorah in front of the City-County Building for a seasonal display did not violate the Establishment Clause, though a crèche in the county courthouse did.

- *Doe v. Small,* 934 F.2d 743 (7th Cir. 1991).

  Citizen filed a lawsuit to challenge a city annual yuletide display, which included 16 large paintings showcasing events in the life of Jesus Christ in hopes of eradicating the religious expression from the public square and striking down the yuletide display. The court struck down the long-standing tradition of including the 16 pictures of Jesus, finding that such a display endorsed religion and as such violated the Establishment Clause.

- *Doe v. City of Westland,* 1987 U.S. Dist. LEXIS 15321 (E.D. Mich. 1987).

  Doe, supported by the ACLU, brought a lawsuit to challenge a Christmas display in the Westland central city complex because it included a nativity scene.

- *Kaplan v. City of Burlington,* 891 F.2d 1024 (2d Cir. 1989).

  Lawsuit challenged a menorah display during December, and the court struck down the display of the menorah on the grounds that such religious expression offended the Establishment Clause.

- *King v. Village of Waunakee,* 517 N.W.2d 671 (Wis. 1994).

  Citizens filed a lawsuit challenging a crèche display during the Christmas season, seeking to eradicate the religious symbol from public square.

- *Mather v. Village of Mundelein,* 864 F.2d 1291 (7th Cir. 1989).

  Plaintiff Rachel Mather challenged the holiday display in front of Village Hall in Mundelein, alleging that the display included a crèche and gave her a sense of inferiority because she's Jewish.

- *Soc'y of Separationists, Inc. v. Clements,* 677 F. Supp. 509 (W.D. Tex. 1988).

  The Society of Separationists filed a lawsuit challenging the "Christmas Carol Program," which is an annual event in the Texas Capitol when a Christmas tree is presented to Texas, politicians make speeches, the Texas Public Employees Association presents money to charity, Santa visits, singers perform Handel's Messiah and two religious carols are performed. The Separationists asserted that the program violates the Establishment Clause and sought a preliminary injunction to prevent the program from occurring.

- Terry Mattingly, *On Religion: Things Got Rough on Church-State Front This Holiday Season,* Naples Daily News, Jan. 17, 2004.

  The article chronicles the Christmas Season and the drama relating to public displays of celebration, including a story on firefighters in Glenview, Illinois who removed Christmas lights after neighbors complained of being offended. In addition, a pastor in Chandler, Ariz. complained that the public library display excluded Christmas and only included Hanukkah and Kwanzaa. The library took down the entire display, rather than augment the display with some information about Christmas. And in Tallahassee, Florida, a controversy erupted when a Jewish Chabad offered to help purchase a menorah for the courthouse yard and the ACLU threatened suit.

CITY SEALS, MOTTO, SCULPTURES, AND THE PLEDGE

- *ACLU v. Capitol Square Review and Advisory Bd.,* 243 F.3d 289 (6th Cir. 2001).

  The ACLU filed a lawsuit challenging Ohio's motto, "With God, All Things Are Possible."

- *Gaylor v. U.S.,* 74 F.3d 214 (10th Cir. 1996).

  The Freedom from Religion Foundation along with some citizens challenged the use of the national motto on the U.S. currency in federal court.

- *ACLU v. City of Stow,* 29 F. Supp. 2d 845 (N.D. Ohio 1998).

  The ACLU challenged the placement of a cross on Stow's city seal, claiming that the use of such a symbol served as an establishment of religion. Unfortunately, the ACLU prevailed in the lawsuit because the court found that a reasonable observer would perceive the cross on the seal as an establishment of religion with the effect of advancing or promoting Christianity, and the city was forced to remove the cross.

- *Harris v. City of Zion,* 927 F.2d 1401 (7th Cir. 1991).

  The Society of Separationists and some other citizen plaintiffs challenged the use of religious symbols on city seals in Rolling Meadows and Zion, Ill. The Rolling Meadows seal contained a Latin cross and was adopted in 1960 and the Zion's seal contained a Latin cross, a dove carrying a branch and was adopted in 1902. The court struck permanently enjoined the cities from using the long-standing seals, considering the use of the religious symbols to violate the Establishment Clause. The decision effectively eradicated both cities' religious history and influence from the city seals.

- *King v. Richmond County,* 331 F.3d 1271 (11th Cir. 2003).

  A small group of citizens filed suit and claimed that the 130-year-old seal of the Superior Court of Richmond County violated the Establishment Clause and was unconstitutional because the image included a portrayal of the Ten Commandments tablets.

- *Robinson v. City of Edmond,* 68 F.3d 1226 (10th 1995).

  Plaintiffs filed suit to challenge the use of a Latin or Christian cross on the Edmond's city seal, which was adopted in 1965 through a competition through the City Counsel and the local newspapers. The cross reflected the historical importance of the Catholic Church in the development of the southwest, but the court held that the seal established religion and struck down the use of the cross, eradicating the historical significance of religion from the seal.

- *Lambeth v. Bd of Comm'rs,* 2004 U.S. Dist. LEXIS 11195 (M.D.N.C. 2004).

  A pair of attorneys filed suit claiming that a display of the national motto on the Davidson County Governmental Center violates the Establishment Clause.

- *Alvarado v. City of San Jose,* 94 F.3d 1223 (9th Cir. 1996).

  The City of San Jose installed and maintained a sculpture ("Plumed Serpent" – of Aztec mythology) to commemorate the Mexican and Spanish contributions to the city's culture. When people began to bring flowers and burn incense at the sculpture, citizens filed suit claiming the sculpture violated the Establishment Clause, but the court upheld that sculpture.

- *Mendelson v. City of St. Cloud,* 719 F. Supp. 1065 (M.D. Fla. 1989).

  A citizen sued the city claiming an illuminated Latin cross on a city water tower violated the Establishment Clause, and the court determined that the cross violated the Establishment Clause and enjoined the city from keeping the cross on the water tower, expunging the religious expression from the public square.

- *Murray v. City of Austin,* 947 F.2d 147 (5th Cir. 1991).

  The Society of Separationists brought suit challenging city insignia of Austin because it included a cross, but the court upheld the city's insignia against the censorship attempt.

- *Myers v. Loudoun County Sch. Bd.,* 251 F. Supp. 2d 1262 (E.D. Va. 2003) (mem.).

  A lawsuit was filed challenging the constitutionality of two Virginia statutes, one that required students in public schools to say the pledge of allegiance and the other required the national motto to be posted at Virginia schools.

Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2002).

Atheist Michael Newdow filed suit to remove the words "under God" from the Pledge of Allegiance. Newdow's daughter attends public elementary school where students recite the Pledge as part of the morning activities. Newdow filed suit claiming that his daughter is injured because she is compelled to witness her teacher lead her classmates in a ritual where they are proclaiming that there is a God and that our nation is under God.

- *Paulson v. City of San Diego,* 294 F.3d 1124 (9th Cir. 2002).

  A citizen challenged the constitutionality of a cross erected in Mt. Soledad Natural Park, which is owned by San Diego, and the court found that the city violated the California Constitution by keeping the cross and forbade the city from maintaining the cross.

- Hugo Martin, *Facing ACLU Complaint, City to Drop Seal's Cross,* L.A. Times, April 29, 2004, at B1.

  The ACLU threatened a lawsuit against the city of Redlands if the city did not remove a cross from the city's seal. The city removed the cross rather fight a legal battle against the ACLU, despite many protests from citizens wanting the seal to retain the cross.

- Sue Fox, *Facing Suit, County to Remove Seal's Cross,* L.A. Times, June 2, 2004, at B1.

  The ACLU threatened a lawsuit if the Los Angeles County did not remove a cross from the county's seal, and the county succumbed to the ACLU's pressure and decided to remove the cross. The cross had adorned the seal since 1957 along with a cow, tuna fish, Spanish galleon, the Hollywood Bowl, and the Goddess Pomono. The region was sealed by Catholic missionaries and the cross memorialized that historical fact.

- *From Springfield, Missouri*

  The ACLU filed a lawsuit challenging the use of an ichthus (i.e. a Christian fish symbol) on the city of Republic's seal, and a federal judge ordered the city to remove the symbol.

- *ACLU Finds Gold at the Foot of the Cross,* Chattanooga Times Free Press, June 24, 2004, B7 (editorial).

  The editori l outlines the amount of money the ACLU receives in attorneys' fees from challenging Ten Commandments displays, religious symbols on city seals, and the Pledge of Allegiance. When a city loses one of these battles in court, the city must pay the ACLU, into the tens of thousands to the hundreds of thousands of dollars.

- John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance,* 38 Harv. C.R.-C.L. L. Rev. 563 (2003).

TEN COMMANDMENTS

- *Harvey v. Cobb County,* 811 F. Supp. 669 (ND. Ga. 1993), aff'd per curiam, 15 F. 3d 1097 (11th Cir. 1994).

  Plaintiffs filed suit challenging a framed panel of Ten Commandments and the Great Commandment displayed at the county courthouse. The court concluded that the displays were unconstitutional, but the court allowed a stay so that the county could incorporate non-religious, historical items, which according to the court would transform the display to fit within constitutional guidelines.

- *Ind. Civ. Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir. 2001).

  The Fraternal Order of the Eagles donated Ten Commandments plaques to communities across the U.S. in the 1950s, including one to the Indiana Statehouse in Indianapolis, which was destroyed in 1991 by a vandal. An Indiana State Representative planned a replacement monument consisting of the Ten Commandments, the Bill of Rights, and the Preamble to the Indiana Constitution, but a lawsuit was filed challenging the proposed monument on the grounds that it would establish religion. The court did indeed find that such a monument would violate the Establishment Clause as citizens may not understand the connection between the display and our nation's legal history and think the monument was erected for religious purposes.

- *Kimbley v. Lawrence County, Ind.,* 119 F. Supp. 2d 856 (S.D. Ind. 2000).

  Civil liberties groups filed suit in response to a proposed Ten Commandments display, which had been authorized by state law, seeking to prevent the display.

- *Mercier v. City of La Crosse,* 276 F. Supp. 2d 961 (W.D. Wis. 2003).

  In the 1960s, the Fraternal Order of the Eagles (FOE) donated a Ten Commandments display to the city, and in the 1980s, citizens complained about the display. The city sold the portion of land on which the monument was located to FOE and placed signs stating that FOE owned the property and that the city did not endorse religion. This did not satisfy the Freedom from Religion Foundation and some citizens, and the organization filed a lawsuit still seeking to strike down the display. The court held that despite the fact that the city had sold the land to a private organization, the Ten Commandments monument still implied that the city was endorsing religion and ordered FOE's land be returned to the city and the monument removed.

- *ACLU of Kentucky v. Grayson County,* 2002 WL 1558688 (W.D. Ky. 2002).

  A Grayson County courthouse display called "Foundations of American Law and Government Display" is composed of a variety of documents including the Ten Commandments, the Magna Carta, the Mayflower Compact, The Star Spangled Banner, among others. But the ACLU filed a lawsuit to challenge the display because the Ten Commandments were included. The court censored the use of the Ten Commandments in the display.

- *ACLU Neb. Found v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), vacated, reh'g granted 2004 U.S. App. LEXIS 6636.

  The ACLU and a member who resided in Plattsmouth, Nebraska filed suit, complaining that the city's Ten Commandment display violated the Establishment Clause. The display was donated to the city in 1965 by the Fraternal Order of the Eagles, which erected many such displays in the 1950s and 1960s in an effort to combat juvenile delinquency. The court struck the display down, determining that it promoted religion.

- *Adland v. Russ,* 307 F.3d 471 (6th Cir. 2002).

  In 2000, Kentucky Governor Paul E. Patton signed a resolution that permitted public school teachers to display the Ten Commandments in their classroom also authorized the relocation of the Ten Commandments monument from the Fraternal Order of the Eagles on Capitol grounds as part of a display that would showcase Kentucky's Biblical historical heritage. Citizens protested the proposed display and filed a lawsuit to challenge the resolution, and the court determined that the proposal was unconstitutional.

- *Baker v. Adam County/Ohio Valley Sch. Bd.,* 2004 U.S. App. LEXIS 481 (6th Cir. 2004) (not recommended for full-text publication).

  A school board erected Ten Commandment monuments that a county ministerial association paid for, and a suit was filed, challenging the constitutionality of the monuments. The school board added other historical documents relating to the development of American law and government to the displays, but the lawsuit continued anyway. The court ordered that the monuments be removed.

- *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2001).

  Elkhart's Municipal Building had a monument of the Ten Commandments, and residents filed suit in objection to the display, claiming it violated the Establishment Clause. The Seventh Circuit struck down the display.

- *ACLU v. McCreary County,* 354 F.3d 438 (6th Cir. 2003).

  The ACLU filed suit to challenge Ten Commandments displays from three Kentucky county courthouses, seeking to have the displays removed, and the Sixth Circuit ordered the displays be eradicated from the courthouse.

- *ACLU of Ohio v. Ashbrook,* 211 F. Supp. 2d 873 (N.D. Ohio 2002).

  The ACLU brought a lawsuit seeking the removal of the Ten Commandments from a state courtroom display, which features the Ten Commandments along with the Bill of Rights, and the court struck down the display.

- *ACLU of Tenn. v. Hamilton County,* 202 F. Supp. 2d 757 (E.D. Tenn. 2002).

  The ACLU filed suit challenging the Ten Commandments displays in county courthouses.

- *ACLU of Tenn. v. Rutherford County,* 209 F. Supp. 2d 799 (M.D. Tenn. 2002).

  The ACLU sued Rutherford County to challenge the Ten Commandments display in the county courthouse lobby.

- *Chambers v. City of Frederick,* 292 F. Supp. 2d 766 (N.D. Md. 2003) (mem.).

Chambers, a Frederick resident, objected to the Ten Commandment display in the city park that the Fraternal Order of the Eagles (FOE) had donated in 1958. In response, the city sold that portion of the park to the FOE, and the FOE covenanted to care for the area. Chambers still not satisfied, filed a lawsuit.

- *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999).

  A school's baseball booster club raised funds by selling ads on the baseball field fence for $400. Mr. DiLoreto, CEO of Yale Engineering, bought an ad, which he sought to use to display the Ten Commandments. But the sign was rejected and Mr. DiLoreto's money was returned. A lawsuit was filed to protect Mr. DiLoreto from viewpoint discrimination.

- *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000).

  A Harlan student's parents filed suit to challenge the public schools' practice posting the Ten Commandments in classrooms. In response to the lawsuit, the school district added other historical documents to the displays, but the lawsuit continued.

- *Freethought Soc'y v. Chester County,* 334 F.3d 247 (3rd Cir. 2003).

  A lawsuit was filed to challenge the Ten Commandments display on the county courthouse facade, but the court allowed the display to remain.

- *Grassroth v. Moore,* 335 F.3d 1282 (11th Cir. 2004).

  Alabama Supreme Court Chief Justice Roy S. Moore installed a Ten Commandments monument in the state's judicial building, and a lawsuit was filed to challenge the display and the monument was forcibly removed.

- *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

  A lawsuit challenged a statute that required the posting of the Ten Commandment in classrooms, with a disclaimer relating to the secular use of the Ten Commandments in Western Civilization.

- *Summum v. City of Ogden,* 297 F.3d 995 (10th Cir. 2002).

  The Summum Church asked the city of Ogden to replace a Ten Commandments display that the Fratemal Order of the Eagles had donated to the city with a monument to the Summum religion. The church filed a lawsuit.

- *Turner v. Habersham County,* 290 F. Supp. 2d 1362 (2003).

  Citizens challenged the display of the Ten Commandments at the Habersham County Courthouse.

- *Van Orden v. Perry,* 351 F.3d 173 (5th Cir. 2003).

  A Texan challenged the Ten Commandments display on state capitol grounds in Austin, but the court upheld the display.

- *Young v. County of Charleston,* 1999 WL 33530383 (S.C. Com. Pl. 1999).

  A court struck down a city courthouse Ten Commandment display as a violation of the Establishment Clause.

- Nicole Buzzard, *A Youth with a Mission: A Santiago High School Junior seeks to post the Ten Commandments at Corona-Norco Campuses,* The Press Enterprise Co. (Riverside, CA), June 30, 2004, B01.

  High school junior Jason Farr wanted to post Ten Commandments fliers in his high school, Santiago High School, and other schools in his district. After

posting the Ten Commandments fliers, he was threatened with a five-day suspension. Additionally, Farr has been informed that the Bible is not suitable material for the silent reading period, despite the fact that it fulfills page and genre requirements.

- Brad Hern, *Coalition Wants to put Monument on Ballot; Boise City Attorneys will Determine whether Voter Initiative is Valid,* The Idaho Statesman, June 14, 2004, at Local, p. 1.

  Supporters of Ten Commandments displays in Treasure Valley are working to overturn the removal of the Ten Commandments display by the city council.

- Kristen Wyatt, *Counties Continue Religious Postings,* The Associated Press, July 8, 2004, North Georgia, B1.

  Two Georgia counties have added Ten Commandment displays to their courthouses, and legal challenges may likely follow.

- *From Manhattan, Kansas:*

  The ACLU and the Americans United for Separation of Church and State challenged a Ten Commandments monument at the city hall in Manhattan. After the lawsuit was filed, the City Commission decided to settle and remove the display.

- *From Everett, Washington:*

  The Americans United for Separation of Church and State filed suit challenging a Ten Commandments Display donated by the Fraternal Order of Eagles.

- Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Text Violate the Establishment Clause,* 39 S. Tex. L. Rev. 101 (1997).

OTHER

- *Marsh v. Chambers,* 463 U.S. 783 (1983).

  A member of the Nebraska legislature brought suit challenging the longstanding practice of employing a chaplain to pray before the opening of each legislative session, claiming the practice was unconstitutional.

- *Barnes-Wallace v. Boy Scouts of America,* 275 F. Supp. 2d 1259 (S.C. Cal. 2003).

  An agnostic family sued San Diego and the Boy Scouts because the city had leased some public parkland to the Boy Scouts. They claimed the lease violated the Establishment Clause.

- *HEB Ministries v. Texas Higher Educ. Coordinating Bd.,* 114 S.W.3d 617 (Ct. App., Austin 2003).

  Texas passed a law forcing all private postsecondary educational institutions in the state to get accreditation from a state agency. Tyndale Seminary was fined $173,000 by the state for using the word "seminary" and issuing theological degrees without government approval. A suit was filed to prohibit the government attempts to control religious training, but the Texas Court of Appeals in Austin upheld the law.

- *Doe v. Vill. of Crestwood,* 917 F.2d 1476 (7th Cir. 1990).

  A long-standing tradition of the Village of Crestwood's "A Touch of Italy" festival was to include an Italian Mass, but a citizen filed suit challenging the mass tradition.

- *Freedom From Religion Found. v. McCallum,* 324 F.3d 880 (7th Cir. 2003).

  The Freedom from Religion Foundation filed a lawsuit to prevent correctional authorities from funding

Faith Works because the halfway house incorporates Christianity into its program.

- *Freedom From Religion Found. v. Romer,* 921 P.2d 84 (Colo. Ct App. 1996).

  The Freedom from Religion Foundation sued Denver City Council members and Arapaho County officials after the Pope visited Denver for World Youth Day in 1993. The lawsuit asserted that using a state park for religious services, temporarily closing the park to the public and use of state funds to facilitate the visit violated the First and Fourteenth Amendments.

- *North Carolina Civil Liberties Union Legal Foundation v. Constangy,* 947 F.2d 1145 (4th Cir. 1991).

  A legal organization and some citizens challenged a judge's practice of opening his session with a prayer, seeking to forbid the judge from continuing the practice.

- Bill McAllister, *Postal Service Ends Christ Camp Stamp Series,* Washington Post, Nov. 19, 1994, at F1.

  The Post Office replaced its Madonna and Child stamp in the holiday stamp collection with an angel stamp after using the Madonna and Child for 28 years. The Post Office resumed the stamp after there was a public outcry.

- *From Madison, Wisconsin:*

  The Freedom from Religion Foundation challenged the constitutionality of a faith-based program working to rehabilitate and treat prisoners who have drug and alcohol addictions. The program was highly successful and President Bush even visited it to stress excellence and success of the program. Although the faith-based program was merely an option, and no prisoner had to choose to attend the program, the

Freedom from Religion Foundation challenged the program because of its disdain that the program was an option for prisoners and that state funding was used by the program, claiming a "separation of church and state" violation.

- *Grace Community Church, et al. v. City of McKinney, et al.,*

  Civil Action No. 4:04CV251

A new church starting in McKinney, Texas began meeting on Sundays in the pastor's home with a few couples. The City took drastic action to shut down a church meeting in the home. The City has no problem with people meeting in their homes for football watch parties, birthday parties or even commercial gatherings to sell Tupperware. However, the City prohibits a church meeting in a home unless the home sits on at least two acres.

SUMMARY OF STATE CONSTITUTIONS
RE: *RELIGION* CLAUSES

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Alabama (*Ala. Const.*)	Art. I, sec. 3	Art. I, sec. 3	Art. I, sec. 3	Art. I, sec. 3	Art. XIV, sec. 263
Alaska (*AK Const.*)	Art. 1, sec 4	–	–	–	–
Arizona (*A.R.S. Const.*)	–	–	Art. 2, sec. 12 Art. 9, sec. 10	–	Art. 11, sec. 7
Arkansas (*AK Const.*)	–	Art. II, sec. 24	–	Art. II, sec. 24	–
California (*Ann. Cal. Const.*)	Art. I, sec. 4	Art. I, sec. 4	Art. IX, sec. 8 Art. XVI, sec. 5	–	Art. IX, sec. 8
Colorado (*C.R.S.A. Const.*)	–	Art. II, sec. 4	Art. IX, sec. 7 Art. V, sec. 34	Art. II, sec. 4	Art. IX, sec. 8

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Connecticut (*C.G.S.A. Const.*)	–	Art. VII	–	Art. VII	–
Delaware (*Del.C.Ann. Const.*)	–	Art. I, sec. 1	Art. X, sec. 3	Art. I, sec. 1	–
Florida (*F.S.A. Const.*)	Art. I, sec. 3	–	Art. I, sec. 3	–	–
Georgia (*Ga Const*)	–	–	Art. I, sec. 2	–	–
Hawaii (*HI Const.*)	Art. I, sec. 4	–	Art. X, sec. 1 Art. VII, sec. 4	–	Art. X, sec. 1
Idaho (*ID Const.*)	–	Art. I, sec. 4	Art. IX, sec. 5	Art. I, sec. 4 Art. IX, sec. 6	Art. IX, sec. 6
Illinois (*ILCS Const.*)	–	Art. I, sec. 3	Art. X, sec. 3	Art. I, sec. 3	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Indiana (*IN Const.*)	–	Art. I, sec. 4	Art. I, sec. 4	Art. I, sec. 4	–
Iowa (*I.C.A. Const.*)	Art. I, sec. 3	–	–	Art. I, sec. 3	–
Kansas (*K.S.A. Const. Bill of Rights*)	–	Sec. 7	Sec. 7	Sec. 7	–
Kentucky (*KY Const.*)	–	Bill of Rights, sec. 5	Education, sec. 189	Bill of Right, sec. 5	–
Louisiana (*LSA-Const.*)	Art. I, sec. 8	–	–	–	–
Maine (*M.R.S.A. Const.*)	–	Art. I, sec. 3	–	–	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Maryland (*MD Constitution, Declaration of Rights*)	–	–	–	Art. 36	–
Massachusetts (*M.G.L.A. Const.*)	–	Art. XI	–	–	–
Michigan (*M.C.L.A. Const.*)	–	–	Art. I, sec. 4 Art. VII, sec. 2	Art. I, sec. 4	–
Minnesota (*M.S.A. Const.*)	–	Art. I, sec. 16	Art. I, sect. 16 Art. XIII, sec. 2	Art. I, sec. 16	–
Mississippi (*MS Const.*)	–	Art. III, sec. 18	Art. VIII, sec. 208	–	–
Missouri (*V.A.M.S. Const.*)	–	Art. I, sec. 7	Art. I, sec. 7 Art. IX, sec. 8	Art. I, sec. 6	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Montana (*MT Const.*)	Art. II, sec. 5	–	Art. X, sec. 6	Art. X, sec. 7	Art. X, sec. 7
Nebraska (*NE Const.*)	–	Art. I, sec. 4	–	Art. I, sec. 4	–
Nevada (*N.R.S. Const.*)	–	Art. I, sec. 4	Art. XI, sec. 10	–	Art. XI, 9
New Hampshire (*N.H. Const.*)	–	Part I, Art. 6	Part I, Art. 6	Part I, Art. 6	–
New Jersey (*N.J.S.A. Const.*)	Art. I, sec. 4	Art. I, sec. 4	Art. I, sec. 3	Art. I, sec. 3	–
New Mexico (*NM Const.*)	–	Art. II, sec. 11	Art. XII, sec. 3	Art. II, sec. 11 Art. XII, sec. 9	–
New York (*McKinney's Const.*)	–	Art. I, sec. 3	Art. XI, sec. 3	–	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
North Carolina (*N.C.G.S.A.*)	–	Art. I, sec. 13	–	Art. I, sec. 13	–
North Dakota (*NDCC Const.*)		Art. I, sec. 3	Art. VIII, sec. 5		Art. VIII, sec. 1
Ohio (*OH Const.*)	–	Art. I, sec. 7	–	Art. I, sec. 7	–
Oklahoma (*OK Const.*)	–	–	Art. II, sec. 5	–	Art. I, sec. 5
Oregon (*OR Const.*)	–	–	Art. I, sec. 5	–	–
Pennsylvania (*PA Const.*)	–	Art. I, sec. 3	Art. III, sec. 15	Art. I, sec. 3	–
Rhode Island (*RI Const.*)	–	–	–	Art. I, sec. 3	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
South Carolina (*S.C. Const.*)	Art. I, sec. 2	–	Art. XI, sec. 4	–	–
South Dakota (*SD Const.*)	–	Art. VI, sec. 3	Art. VI, sec. 3	Art. VI, sec. 3	Art. VIII, sec. 16
Tennessee (*TN Const.*)	–	At. I, sec. 3	–	Art. I, sec. 3	–
Texas (*Vernon's Ann. Texas Const.*)	–	Art. I, sec. 6	–	Art. I, sec. 6	–
Utah (*U.C.A. 1953, Const.*)	Art. I, sec. 4	Art. I, sec. 4	Art. I, sec. 4 Art. X, sec. 9	–	–
Vermont (*VT Const.*)	–	–	–	Chap. I, art. 3	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Virginia (*VA Const.*)	Art. I, sec. 16	Art. I, sec. 16	Art. I, sec. 16; Art. IV, sec. 16	Art. I, sec. 16	Art. VIII, sec. 10
Washington (*RWCA Const.*)	–	–	Art. I, sec. 11; Art. IX, sec. 4	–	Art. IX, sec. 4
West Virginia (*WV Const.*)	–	Art. III, sec. 15	Art. III, sec. 15	Art. III, sec. 15; Art. III, sec. 15(a)	–
Wisconsin (*W.S.A. Const.*)	–	Art. I, sec. 18	Art. I, sec. 18	Art. I, sec. 18	Art. X, sec. 3
Wyoming (*WY Const*)	–	–	Art. I, sec. 19 Art. VII, sec. 8	–	Art. VII, sec. 12

Jefferson's Letter to the Danbury Baptists

The Draft and Recently Discovered Text

To messers Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut.

Gentlemen

The affectionate sentiments of esteem & approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. my duties dictate a faithful & zealous pursuit of the interests of my constituents, and, in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more & more pleasing.

Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" thus building a wall of eternal separation between Church & State. ***Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect,***

[Jefferson first wrote: "confining myself therefore to the duties of my station, which are merely temporal, be assured that your religious rights shall never be infringed by any act of mine and that." These lines he crossed out and then wrote: "concurring with"; having crossed out these two words, he wrote: "Adhering to this great act of national legislation in behalf of the rights of conscience"; next he crossed out these words and wrote: "Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience I shall see with friendly dispositions the progress of those sentiments which tend to restore to man all his natural rights, convinced that he has no natural rights in opposition to his social duties."]

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & the Danbury Baptist [your religious] association assurances of my high respect & esteem.

Th Jefferson
Jan. 1. 1802.

(20)

~~No. 03-1963~~ 03-1693

Supreme Court, U.S.
FILED
DEC 6 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, ET AL.,
Petitioners,

v.

ACLU OF KENTUCKY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Amicus adopts the factual summary as presented by Petitioner. The questions presented are:

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equally sized frames containing an explanation of the display, along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* Test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia. John W. Whitehead founded the Institute in 1982. Its mission is to educate individuals about their civil liberties and to provide free legal representation to those whose constitutional rights are violated. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases, including *Frazee v. Department of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys regularly handle First Amendment cases that concern the interplay between the Establishment Clause and the Free Speech and Free Exercise Clauses. The Institute has published educational materials and taught courses in this area as well.

The Rutherford Institute supports the Petitioners in this case because of the serious errors in the reasoning that led the Sixth Circuit to conclude that the historical document display involved in this case violates the Establishment Clause because of its inclusion of the Ten Commandments. More importantly, the Institute recognizes that this case presents the Court with a rare opportunity to correct

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent have been filed with this Brief. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

fundamental flaws in its Establishment Clause jurisprudence. In light of the important issues being raised in this case and their centrality to the very mission of The Rutherford Institute, the Institute respectfully requests that its arguments be heard.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioners, State of Kentucky, and the individual petitioners.

SUMMARY OF THE ARGUMENT

The historical document display that the Sixth Circuit found to violate the First Amendment's Establishment Clause due to the inclusion of the Ten Commandments is consistent with displays that this Court has upheld against Establishment Clause challenges. The Sixth Circuit's opinion includes an unwarranted intrusion into the logic behind local government officials' choice to include the Ten Commandments in the display along with numerous secular documents. However, the court's opinion is indicative of a much greater problem: a modern Establishment Clause jurisprudence that is unworkable and yields bad results.

Amicus respectfully submits that this Court not only should reverse the decision below and uphold the particular display at issue here but, more importantly, should rework its Establishment Clause analysis in fundamental respects. *Amicus* maintains that the Court should renounce the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), abandon its practice of incorporating the Establishment Clause into the Fourteenth Amendment for

application to the states, and return to a historically accurate and logically sound application of the Clause to the federal government.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION ADOPTS A NOVEL ANALYSIS THAT CONSTITUTES AN UNWARRANTED DEPARTURE FROM THIS COURT'S DISPLAY CASE PRECEDENTS.

As Circuit Court Judge Ryan pointed out in his dissent, the County's display falls squarely within the boundaries marked out by this Court in *Lynch v. Donnelly*, 465 U.S. 68 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) for constitutionally acceptable government displays that include religious objects. *ACLU v. McCreary County*, 354 F.3d 438, 467 (6th Cir. 2003) (Ryan, J., dissenting). Therefore, this Court should uphold the display unless it chooses to effectively overrule said decisions.

Just as the Christmas season displays upheld in *Allegheny* and *Lynch* included a menorah and a crèche, respectively, among a variety of secular objects, the display now before the Court includes reproductions of the Ten Commandments among a variety of secular objects. According to the Sixth Circuit's opinion, however, whenever a local government's display includes a religious symbol or document, federal judges must engage in a searching analysis not only of the impressions the display will likely have upon observers, but also of the strength of logic behind local government officials' choices of objects to be grouped together in the display. According to the Sixth Circuit, courts must

intervene to overrule those choices if the level of "fit" between the objects is found to be less than airtight. This type of searching review is far more appropriate for a college logic or philosophy professor's review of student mid-term exams than for federal judges' review of actions by local government officials.

The Sixth Circuit bases its ruling not on the reasoning applied by this Court in *Lynch* and *Allegheny* but, rather, upon dicta from this Court's opinion in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).[2] The court below is convinced, ostensibly based upon its reading of the *Stone* opinion, not only that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message," but also that the government entity must persuasively demonstrate an "analytical or historical connection with the other documents." *McCreary*, 354 F.3d at 448, 451. The clincher, however, is that this connection must be demonstrated in such a way as to not only be reasonable to the average observer, but to absolutely convince the most skeptical of federal judges that it is logically unquestionable.

One of the obvious problems with the Sixth Circuit's reasoning is that the holiday display upheld by this Court in *Lynch* would not have survived under the analysis applied below. The lower court's analysis focused on the asserted relationship between the Ten Commandments and the other documents displayed, as opposed to the relationship

[2] It is interesting to note that the Sixth Circuit chose to base its analysis on this Court's precedent involving the same religious object (the Ten Commandments), rather than precedents that involved similar contexts (i.e., display of religious object among secular objects).

between the Ten Commandments and the overall theme of the display. *Id.* at 451 (describing the display's "fundamental flaw" as "the lack of a demonstrated analytical or historical connection *with the other documents*.") (emphasis added). The "evidence" of historical and analytical connection presented to and examined by the Sixth Circuit led it to detect a two-fold "problem."

> One, the evidence does not appear in the actual display of the Ten Commandments, so an observer would not actually be made aware of these facts... Two, even assuming that the Ten Commandments are the sole or primary source of some laws codified by certain Colonies and State legislatures, this "fact" is irrelevant to the fundamental assertion in the display that the Ten Commandments clearly influenced the creation of the *Declaration of the* [sic] *Independence* and, thus, the formation of our country and legal tradition.

Id. at 452.

The Sixth Circuit has apparently ignored the fact that the display upheld by this Court in *Lynch* did not include any "evidence" for bystanders to examine to understand what the "connection" was between, for example, the candy-striped poles and the crèche, or between the talking wishing well and the crèche. In fact, the local government officials in *Lynch* would have been hard-pressed to present convincing historical evidence to the Court to demonstrate that a crèche is historically or analytically related to candy-striped poles or talking wishing wells.

With respect to the candy-striped poles, the Santa figure and reindeer, and perhaps a few other objects included in the *Lynch* display, the most that can be said of the "connection" between the actual objects is that people commonly associate them with the Christmas season. But the Sixth Circuit has moved far beyond the requirement that objects in a display have a casual connection to the theme of the display; instead, the Sixth Circuit has imposed a requirement that government officials demonstrate that the religious object in a display is, as a matter of historical fact, related to each individual secular object. Moreover, the Sixth Circuit's analysis would apparently not be satisfied by a tradition-based analytical or historical link. Rather, the court requires officials to prove an absolute scientific connection.

The Sixth Circuit's analysis takes an already-criticized approach to determining the constitutionality of government displays that include religious symbols and morphs it into an even more extreme inquisition. This Court's display cases have been the subject of ridicule among some judges and scholars who believe that resolution of Establishment Clause questions should not turn on the outcome of a judge's painstaking determination of whether, in light of the number of, nature of, positioning of, and distance between them, secular objects grouped with religious objects effectively insulate bystanders from any religious effects. As Judge Easterbrook once lamented:

> It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended - but would have been less so were the crèche five feet closer to the jumbo candy cane."

American Jewish Congress v. Chicago, 827 F.2d 120 (7th Cir. 1987) (Easterbrook, J., dissenting). Unfortunately, the Sixth Circuit's opinion in this case demonstrates that Judge Easterbrook's fears were well-founded—not just for holiday display cases, but for any type of display that involves a religious symbol. In the words of Justice Kennedy, the type of analysis conducted by the Sixth Circuit "trivialize[s] constitutional adjudication" and "embraces a jurisprudence of minutiae." *Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting).

In *Lynch*, this Court found that

> [t]o forbid the use of this one passive symbol - the crèche - at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 465 U.S. at 686. Surely, the Sixth Circuit's reading of the Establishment Clause to essentially forbid displays of the Ten Commandments unless they are incorporated into some type of "secular curriculum" is an equal or greater overreaction to the Clause's mandate.

The real tragedy, however, in the Sixth Circuit's reasoning is its conclusion that the connection between the Decalogue and the other historical documents was insufficient. Just as the County argued below, the Ten Commandments are venerable instructions that have, in fact, provided the foundation for much of the legal tradition of this country. In light of not only the overwhelming historical evidence of this "connection" that the Ten Commandments in particular and religion in general have with our nation's founding, but also the ubiquitous recognition of that connection by members of this Court and many others, it is most appalling that the Sixth Circuit managed to find evidence of this fact lacking.

"It is . . . undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World." *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting). As Judge Ryan pointed out in his dissent below, "the Supreme Court has repeatedly stated that there is a crucial link between religion and our laws and government, for 'we are a religious people whose institutions presuppose a Supreme Being.'" *McCreary*, 354 f.3d at 470 (Ryan, J., dissenting) (*quoting Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). Judge Ryan also aptly acknowledged that every circuit that has considered a challenge to the public display of the Ten Commandments has recognized their foundational role in American law and government. *Id.* at 471 (Ryan, J., dissenting). "There are countless . . . illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Lynch*, 465 U.S. at 677. "The influence of religion upon American law and government is a fact of American history and politics that has been widely recognized by scholars,

jurists, legislators, presidents, and, not least, the Founders themselves." *McCreary*, 354 F.3d at 468 (Ryan, J., dissenting). The majority opinion below even acknowledges this, quoting from a Seventh Circuit opinion: "The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *Id.* at 448 (*quoting Books v. City of Elkhart, Ind.*, 235 F.3d 292, 302 (7th Cir. 2000)).

In short, even if this Court would otherwise countenance what *amicus* respectfully submits was an entirely inappropriate inquiry by the Sixth Circuit into the logic behind the County's asserted reason for grouping the Ten Commandments with the other documents in the display, surely it cannot countenance the fact that the court's application of its own analysis fails altogether to recognize the historical fact that the Ten Commandments did, indeed, provide the groundwork for our legal and moral traditions.

Finally, the Court should reverse the decision below because the test applied by the Sixth Circuit inevitably results in hostility toward religion. The only documents or items that will ever be banished from a government display solely because of a lack of "fit" with the other items will be religious ones. This problem is apparent from the facts in this very case. Anyone playing the Sixth Circuit's game of "Which of these objects is not like the others?" would likely choose "The Star Spangled Banner" over the Ten Commandments in the context of the display considered here. It is doubtful that either the text or the melody of our national anthem played a central role in forming the "Foundations of American Law and Government."

However, the song flies under the court's radar because it is generally thought to be secular.[3]

II. THE SIXTH CIRCUIT ERRED IN BASING ITS HOLDING ON THE FACT THAT THE ORIGINAL DISPLAY CONSISTED SOLELY OF THE TEN COMMANDMENTS.

In applying this Court's *Lemon* Test to reach its conclusion that the displays it considered violated the Establishment Clause, the court below found that the display could not survive the "purpose" prong of that test because "the predominate purpose of the displays was religious." *McCreary*, 354 F.3d at 447. The court based this determination, in part, on the "evolution" of the display. Adopting the reasoning of the district court, the Sixth Circuit found that the history behind the display, which originally included only the Ten Commandments, "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]" *Id.* at 457.

According to the Sixth Circuit, this inquiry into the evolution of the display is an appropriate means of evaluating the local government officials' primary purpose in creating the display because this Court considered the history behind the policy it struck as unconstitutional in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). If this is a correct reading of *Santa Fe*, then the county

[3] In fact, even "The Star Spangled Banner" includes references to our nation's religious heritage in the last stanza:
"Blest with victory and peace, may the heav'n rescued land
Praise the Power that hath made and preserved us a nation.
Then conquer we must, when our cause it is just,
And this be our motto: 'In God is our trust.'"

officials who are involved in this case are now effectively precluded from ever making use of the Ten Commandments in any capacity. For if they were to turn from this litigation and decide (for whatever reason) to incorporate the Ten Commandments into a larger curriculum of comparative religion or ethics, a use of the Decalogue of which the court would apparently approve, the Sixth Circuit is bound to point to the same evolution of the displays considered below and proclaim (in the spirit of an "Aha!") that the officials' true purpose was primarily religious. In short, if the Sixth Circuit's theory regarding the importance of the evolution of a challenged policy is correct, then the challenged government officials, once found to have had a primarily religious purpose, cannot avoid an Establishment Clause violation, even if they precisely follow the direction provided by this Court in *Stone*, *Lynch*, or *Allegheny*.

The Sixth Circuit's "taint" theory also plays a part in leading the court to conclude that the displays had the impermissible effect of "endorsing" religion. *McCreary*, 354 F.3d at 460. The panel agreed with the district court that "the history of the displays bolstered the reasonable observer's perception of the state endorsement of religion inasmuch as the observer is charged with knowing the history of the respective displays, and in each case the history indicates that the displays were originally intended to enshrine the Ten Commandments..." *Id.* at 461.

It is difficult to comprehend why the "reasonable observer" is charged with this detailed knowledge of the entire history behind a display of documents in a local government building. Yet, the Sixth Circuit assumes that he or she would be unable to grasp something so basic to American history as the importance of the Ten

Commandments to our Founding Fathers. The court believes that some detailed "curriculum" is required to explain the historical or analytical link between the Ten Commandments and other documents that are associated with our nation's Founding Fathers. While by virtue of a legal fiction the Sixth Circuit's reasonable observer is fully aware of how the local government's historical document display has changed over time, he or she is deemed completely ignorant of something that every American child knows—that most of our nation's founders were deeply religious and that the Ten Commandments were fundamental to the moral values that were echoed in the laws they created.

The Sixth Circuit cannot be forced to shoulder all the blame for the many problems inherent in its "taint" theory. The court's hand was forced by the requirement that it find some way to sift the motives of local government officials in the hope that it might discern the ratio of "secular" purpose to "religious" purpose. According to the Court's current methodology for reviewing Establishment Clause questions, a court must not only ask whether the effect of a display is, in any way, to lead to the establishment of a religion but also must ask what the officials were thinking when they constructed the display. It appears that the Court's Establishment Clause jurisprudence has thus been reduced not only to one of minutiae, but also to one of mind-reading. *See Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting) (describing the Justice Blackmun opinion as having embraced a "jurisprudence of minutiae"). A thorough review of the case now before the Court must lead the Court to question, once again, the wisdom and propriety of the *Lemon* Test. *Amicus* now turns to address that issue.

III. THE COURT SHOULD RENOUNCE THE *LEMON* TEST.

Simply stated, the *Lemon* Test is unworkable and yields bad results. The clearest evidence of this is seen in the fact that this Court has abandoned the Test when its application would have produced a ruling that the Court found inappropriate. The best example is *Marsh v. Chambers*, 463 U.S. 783 (1983).

In light of the historical data the Court considered in *Marsh*, the Court surely was correct in concluding that Nebraska's practice of maintaining a paid legislative chaplain presented "no real threat" of an Establishment Clause violation. For, as the Court recognized, "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. *Marsh*, 463 U.S. at 786. At the same time, there is simply no way that the practice could be sustained under the *Lemon* Test. In fact, Nebraska's policy of using state funds to pay a Presbyterian minister to deliver prayers at legislative sessions would likely be found to violate all three prongs of the Test if the Court had chosen to apply it.

While this Court has the freedom to apply the *Lemon* Test selectively so as to avoid reaching wrong results, lower courts do not enjoy the same discretion. The Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." However, the Court has not yet seen fit to free lower courts from the bondage that the *Lemon* Test imposed. *Lynch*, 465 U.S. at 668, 679. *Amicus* submits that this produces an intolerable state of affairs: when presented with an Establishment Clause question, every court in the nation save this one is bound to

apply a test that simply does not work in all circumstances. *Amicus* implores the Court to explicitly renounce the *Lemon* Test and to announce a new method of analysis that will produce logically and historically sound results.

As one constitutional scholar put it, under the Court's current Establishment Clause doctrine, "judges have been forced to engage in interminable parsing of the facts and circumstances of each challenge to any government action even remotely connected with religion under indefinite and shifting standards." James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 Drake L. Rev. 171, 212-13 (Winter 2004).

Not only are lower courts helplessly tethered to an Establishment Clause test that cannot be trusted to produce correct outcomes, the situation becomes steadily worse as new elements of the analysis appear to emerge each time this Court decides a case involving an Establishment Clause question. For instance, an element of "audience coercion" has been added to the analysis, apparently for situations involving minors. *Lee v. Weisman*, 505 U.S. 577 (1992), *Santa Fe Indep. Sch. Dist., supra.* Indeed, many lower courts have interpreted dicta from this Court's opinion in *Edwards v. Aguillard*, 482 U.S. 578 (1987), to indicate that the Court has created a sort of second tier of scrutiny for cases involving public schools. *See id.* at 583-84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."). *Amicus* submits that many cases decided by lower courts have turned the entire First Amendment on its head by using the Establishment Clause to drive even private religious expression from our nation's schools. *See, e.g., Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271

(3d Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 2049 (2004) (child prohibited from distributing religious pencils and candy canes to public school classmates at party); and *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003) (tiles painted by family members of Columbine victims were removed from wall murals because they depicted religious references).

As a result of this Court's own growing dissatisfaction with the *Lemon* Test, it has, at times, undertaken an application of Justice O'Connor's "endorsement test," which lower courts have begun to faithfully apply either in addition to, or as part of, the *Lemon* analysis. There appears to be uncertainty as to how the endorsement test is different from the "effects" prong of the *Lemon* Test, if at all.

Compounding the confusion created by this Court's lack of confidence in and commitment to the *Lemon* Test is the fact that lower courts must decipher the implications of *Marsh*. That case, perhaps more than any other, points to the white elephant that has been silently standing in the courtroom ever since this Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). How can the Christian acknowledgments of God that pervade our government's history and traditions withstand the glare of the Court's modern Establishment Clause jurisprudence? *Amicus* respectfully submits that they cannot.

Yet, lower courts are forced to grapple with the disconnect in the context of a burgeoning onslaught of Establishment Clause challenges. One foothold upon which they have seized in an effort to reconcile the blatant inconsistency of the *Marsh* decision with the rest of the Court's Establishment Clause jurisprudence is the

sectarian/nonsectarian distinction. This distinction was discussed briefly in *Marsh*, but the Court in *Allegheny* suggested that it was the very basis for the *Marsh* ruling. 492 U.S. at 603 ("The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'") (*citing Marsh*, 463 U.S. at 793, n.14). The result has been a growing trend for courts to uphold religious references that are "nonsectarian," but to strike them as unconstitutional establishments if they are "sectarian."

Upon closer examination, it becomes apparent that the inconsistency is not so easily resolved because the Court has proclaimed that the Establishment Clause forbids the government to establish a "civic" religion, just as it forbids it to establish an exclusively Christian one. *See Lee*, 505 U.S. at 590 ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."); *Board of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (noting that the principle at the heart of the Establishment Clause is that government may not prefer one religion to another, or religion to irreligion).

Moreover, any attempt to broaden the appeal of prayers or other religious references engenders the type of entanglement with religion that the Establishment Clause prohibits. For instance, the imposition of a "non-sectarian" requirement on those who offer legislative prayers requires those individuals to compose their prayers in accordance with the wishes of the government. Surely *this* is precisely what the Establishment Clause was meant to forbid. *See Widmar v. Vincent*, 454 U.S. 263, 272, n.11 (1981) (observing

entanglement problem posed by officials monitoring speech to exclude religious content).

Thus, the argument that the Establishment Clause permits "civic" religious acknowledgments but prohibits Christian ones should be rejected. If "civic" legislative prayers do not offend the Establishment Clause, then "sectarian" prayers must be equally innocuous. However, following this Court's dicta in *Allegheny*, lower courts have recently struck down sectarian legislative prayers as unconstitutional. *See, e.g., Wynne v. Town of Great Falls*, 376 F.3d 292, 298 (4th Cir. 2004) ("*Marsh* and *Allegheny* also teach that a legislative body cannot, consistent with the Establishment Clause, 'exploit' this prayer opportunity to 'affiliate' the Government with one specific faith or belief in preference to others."); *Rubin v. City of Burbank*, 101 Cal.App.4th 1194, 1203 (2000) ("The court's discussion of *Marsh* in *Allegheny* reflects that it considered the removal of references to Christ to have been essential to the *Marsh* ruling..."), *cert. denied*, 538 U.S. 1034 (2003).

Perhaps the greatest problem with a proposed "non-sectarian" requirement is that it enhances, rather than diminishes, the likelihood that observers will perceive government favoritism toward particular religions. If a prayer directed to "Jesus" is considered "sectarian" and, thus, is prohibited but a prayer directed to "God" is considered "non-sectarian" and, thus, is permissible, then the government evinces favoritism toward religious individuals who believe in "God" but do not believe that "Jesus" is God. How would prayers mentioning Allah be treated under a policy that allows only "non-sectarian" prayer? Such prayers certainly indicate a preference for a particular religion.

As it turns out, in most instances "sectarian" is code for expression that dares mention that most controversial of figures, Jesus Christ. As Justice Kennedy once wrote,

> If there be such a person as the "reasonable observer," I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.

Allegheny, 492 U.S. at 677 (Kennedy, J., dissenting).

In short, this emerging trend of staking constitutional adjudications upon whether religious speech is "sectarian" or "nonsectarian" is just an example of how the Court's current methodology of Establishment Clause analysis has steered the nation's judiciary onto an analytical path that is not only logically unsound, but also leads toward serious violations of the Establishment Clause and even toward religious discrimination. *Amicus* respectfully submits that the old maxim "better late than never" is appropriate here; the Court should renounce the *Lemon* Test and rework its method of evaluating Establishment Clause cases.

IV. The Court Should Discontinue Application of the Establishment Clause to the States Through the Fourteenth Amendment and Return To a Historically Accurate Application of the Clause.

As demonstrated above, and as this Court is no doubt well aware, its Establishment Clause analysis is in desperate need of overhaul. *Amicus* submits that there is only one way to ensure appropriate outcomes and remove the federal judiciary from the quagmire that inevitably results from an Establishment Clause test that requires judges to dissect the motives behind and effects of every action by state and local governments that mentions or involves religions. *Amicus* respectfully submits that the only way to untangle the web that now confronts courts deciding Establishment Clause questions is to return the Clause to its rightful place in the structure of our Bill of Rights by discontinuing application of the Establishment Clause to the states through the Fourteenth Amendment and by applying it to the federal government in a way that is consistent with the original intent of its drafters.

A. The Court Should Discontinue Applying the Establishment Clause to the States by Operation of the Fourteenth Amendment.

In 1947, Justice Hugo Black authored an opinion that, in effect, forced a square peg into a round hole by applying the Establishment Clause for the first time against state governments. *Everson, supra*. *Amicus* submits that the glaring logical flaws in the reasoning behind this doctrine compel the Court to overturn it. Only then can the Court start afresh in creating a reasonable and workable methodology for applying the Establishment Clause.

As with the other parts of the Bill of Rights that were held to have been incorporated through the Fourteenth Amendment for application to the states, the Establishment Clause originally applied only to the Federal government. But important considerations far beyond the mere fact that the Establishment Clause was not originally intended to apply to state governments strongly counsel against the incorporation doctrine with respect to this Clause.

While the nature of the other basic liberties incorporated into the Fourteenth Amendment make the Court's incorporation doctrine, in general, a natural extension of the Bill of Rights, application of the Establishment Clause against the states effectively turns the Clause on its head. This is because the other incorporated rights are guarantees of personal liberties to individuals, while the original purpose of the Establishment Clause was to restrain the federal government from interfering with state laws respecting religion and, indeed, with the numerous state establishments of religion that then existed. *See School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-310 (1963) (Stewart, J., dissenting) ("The Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments."). As pointed out by one scholar:

> The key point is not simply that, as with the rest of the First Amendment, the establishment clause limited only Congress and not the states. As we have seen, that point is obvious on the face of the Amendment, and is confirmed by its legislative history. ... Nor is the main point exhausted once we recognize that state governments are in part the special beneficiaries of,

> and rights-holders under, the clause. As we have seen, the same thing could be said, to some degree, about the free speech clause. The special prick of the point is this: the nature of the states' establishment clause right against federal dis-establishment makes it quite awkward to "incorporate" the clause against the states via the Fourteenth Amendment. ... [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion – a right explicitly confirmed by the establishment clause itself!

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1158 (March 1991). Thus, while there is much wisdom in applying the other guarantees of liberty to state and local governments, the logic of applying the Establishment Clause to them is dubious, at best. In the words of another constitutional scholar:

> The text of the Establishment Clause is transparently "structural," prohibiting a federal establishment of religion and granting no distinct liberty interest other than to be free from a federally established religion, an interest that is adequately protected by the First Amendment itself. At the time of its adoption, the Clause not only barred the federal government from changing the religious status quo in the states, it actually vested in the states, in conjunction with the Tenth Amendment, the power to regulate religion.

Knicely, 52 Drake L. Rev. at 175.

The *Everson* opinion did not stop at its confounding conclusion that the Establishment Clause should apply

against the states; it went on to interpret the Clause to, among other things, prohibit any government from giving aid or preference to any or all religions. 330 U.S. at 511. In one fell swoop, the Court held that states that had officially established religions at the time of the First Amendment's enactment were, by virtue of that Amendment, prohibited from so much as expressing a preference for religion over non-religion. The Establishment Clause was thus stretched beyond recognition in terms of both scope and meaning.

The result of the incorporation of the Establishment Clause into the Fourteenth Amendment, together with the strict separationist interpretation of the Clause announced in Black's opinion, has been the schizophrenic "separation of church and state" jurisprudence that now governs the increasingly common challenges to anything religious that appears in public.

> [J]udges have been forced to engage in interminable parsing of the facts and circumstances of each challenge to any government action even remotely connected with religion under indefinite and shifting standards. Certainty in the law has been undermined and understanding of the law by the citizenry and government has been obfuscated. *Everson*'s mandates have also led to countless assertions by separationist proponents and social gadflies wielding the Establishment Clause as a sword to extirpate the religious viewpoint from American public life under the banner of the ostensible right to be free from religion. Likewise, opponents of separation have solicited popular support in attempts to force confrontations with *Everson*'s mandates.

Knicely, 52 Drake L. Rev. at 212-13.

Those who fear that discontinuation of incorporation of the Establishment Clause into the Fourteenth Amendment would result in widespread persecution of religious minorities should find solace in the strong arms of the Equal Protection and Due Process Clauses. The Fourteenth Amendment effectively insulates religious minorities from discrimination by subjecting classifications relating to religion to strict scrutiny. *Id.* at 220. Additionally, state constitutions will continue to protect religious liberties. The Establishment Clause, however, was never intended to be a panacea for every form of religious discrimination at every level of government. The attempt to interpret it as such has produced confusion and provided a foothold for hostility toward religion.

Amicus respectfully submits that nothing short of the dramatic step of discontinuing the incorporation of the Establishment Clause into the Fourteenth Amendment will cure the hopelessly muddled condition of modern Establishment Clause jurisprudence. Moreover, an intellectually honest analysis of the logic underlying the incorporation doctrine with respect to this particular Clause demands nothing less than wholesale abandonment of the doctrine in Establishment Clause cases.

B. When Applying the Establishment Clause to the Federal Government, the Court Should Return to a Historically Accurate Interpretation of the Clause.

Amicus respectfully submits that the Court cannot turn a blind eye to the glaring inconsistency between the official recognitions and endorsements of Christianity that abounded in our nation's history before and after the enactment of the Establishment Clause and the demand of absolute governmental neutrality toward religion and irreligion that modern judges have been charged with enforcing. *Amicus* will not here belabor the tomes of historical data that point to the undeniable conclusion that the Establishment Clause was never intended to prohibit either personal religious expression by government officials or recognition of the historical fact that Christian values were fundamental to our nation's founders.

It would indeed be difficult for anyone to argue that the First Amendment mandates a "secular political culture" in light of the fact that our nation's history and traditions are replete with references to God. Our Declaration of Independence acknowledges the Creator who has endowed all people with unalienable rights. Our national motto is, "In God We Trust." The Pledge of Allegiance declares that we are "one nation under God." Acknowledgments of God are events common to our national landmarks. The peak of the Washington Monument proclaims "Praise Be to God" in Latin, and several tribute blocks lining the Monument's stairway are inscribed with biblical passages. The Jefferson Memorial contains at least four inscriptions that express religious sentiments, including "God who gave us life gave us liberty." And the Liberty Bell is inscribed with the words of Leviticus 25:10. These are all indelible indications that our government has never been "neutral" toward religion and irreligion.

These venerable national traditions simply cannot withstand a straight-faced analysis under the *Lemon* Test or any Establishment Clause doctrine that requires government to maintain a strict neutrality between religion and irreligion. Nor can a paid legislative chaplaincy or the prayers that traditionally open legislative and court sessions withstand such analysis.

The Court should abandon any attempt to rescue these, our nation's cherished traditions, from the relentless jaws of an Establishment Clause jurisprudence that bears little similarity to the Clause as it was actually conceptualized and drafted. *Amicus* implores the Court to embrace instead the original intent of the drafters with respect to the Clause.

As Justice Kennedy has explained:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring

> government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Allegheny, 492 U.S. at 657-58 (Kennedy, J., dissenting).

Amicus submits that the path of declaring that certain historical recognitions of God have achieved a sort of adverse possession of constitutional legitimacy by virtue of their ancient roots in our national traditions is altogether unsatisfactory. As the Court recognized in *Marsh*, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees..." The guarantees of our Bill of Rights are far too precious to be trumped by tradition. The only way to reconcile the Establishment Clause with the recognitions of religion in general and Christianity in particular that pervade our nation's historical documents, traditions, and landmarks is to embrace the fact that the Clause never precluded such recognitions. And if it did not then, it cannot now.

CONCLUSION

The display that the Sixth Circuit struck as unconstitutional is consistent with this Court's precedents involving displays that include a religious object among secular objects. However, the errors in the judgment below merely point to the greater problems inherent in the Court's modern Establishment Clause jurisprudence. *Amicus* respectfully submits that the doctrine announced in the Court's 1947 *Everson* decision was based on fundamental interpretive and logical errors, and, for that reason, the methodology of Establishment Clause analysis derived from *Everson* should be abandoned. Therefore, the Court should discontinue incorporating the Establishment Clause into the

Fourteenth Amendment for application against the states and return to a historically accurate and logically sound interpretation of the Clause.

Respectfully Submitted,

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No. 03-1693

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE, THOMAS MORE LAW CENTER, IN SUPPORT OF PETITIONERS

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December 8, 2004

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INTEREST OF AMICUS CURIAE

The Thomas More Law Center is a national, non-profit public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the religious freedom of Christians, including the display of the Ten Commandments on public property, time-honored family values, and the sanctity of human life.[1]

The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through education, litigation, and related activities. As part of its litigation efforts, the Thomas More Law Center has represented government entities in defense of lawsuits seeking to remove Ten Commandments monuments from public property, and the Thomas More Law Center has submitted amicus curiae briefs in this Court and in the United States Court of Appeals for the Sixth, Seventh, and Eleventh Circuits in support of the display of such monuments on public property. Accordingly, the Thomas More Law Center has acquired an expertise in this area of the law, which will be of assistance to this Court in deciding this case.

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[1] The parties to this litigation have consented to the filing of this brief, and letters indicating such consent have been filed with this Court. Sup. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporation and no stock. Sup. Ct. R. 29.6.

The Thomas More Law Center appears as amicus curiae in support of petitioners and urges this Court to reverse the judgment below.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Sixth Circuit found that a display containing only the Ten Commandments imprinted the defendant's "purpose" from the beginning with an "unconstitutional taint." It thereby created a new rule for Establishment Clause review that allows a government's *past* action to control the analysis of a *current* action's constitutionality. In so doing, the Sixth Circuit shifted the standard of *Lemon's* purpose prong. It ignored this Court's rule that government action motivated in part by a religious purpose may still satisfy the purpose prong. It further ignored this Court's rule that courts should accept a government's articulated purpose unless evidence clearly indicates a sham. Further, the Sixth Circuit's "unconstitutional taint" doctrine ignores this Court's caution against second-guessing legislative purposes. In contrast to the Sixth Circuit's approach, the proper inquiry is into the purpose of the *current* display and whether the secular purpose stated by the government is more than a mere sham. By interpreting the purpose prong to include an "unconstitutional taint" on *subsequent* conduct, the Sixth Circuit wrongly precludes governments from having an opportunity to turn unconstitutional behavior into constitutional behavior.

ARGUMENT

In finding that the government possessed an improper purpose for creating the "Foundations of American Law and Government Display," the Sixth Circuit affirmed the district court's finding that the *original* display, containing only the Ten Commandments, "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint." *ACLU v. McCreary Cty.*, 354 F.3d 438, 457 (6th Cir. 2003).

Although the Sixth Circuit held that the evolution of the display did not *conclusively* reveal an unconstitutional purpose for the current display, the Sixth Circuit did find that it "strongly indicated" and "patently evidence[d]" the government's current purpose. *Id.* at 458. Regardless of the exact weight given to the government's prior display in determining its current purpose, the very notion that prior conduct results in a continuing permeation of unconstitutionality is contrary to the proper inquiry into the government's actual purpose under *Lemon*.

I. THE CONCEPT OF "UNCONSTITUTIONAL TAINT" EITHER CARRIES THE PURPOSE PRONG BEYOND ITS USEFULNESS OR UNDERMINES THE ABILITY OF STATE ACTORS TO REMEDY VIOLATIONS OF THE CONSTITUTION.

The phrase "unconstitutional taint" has long been a part of constitutional law cases. The Sixth Circuit, however, injected a novel interpretation by juxtaposing that concept with the purpose prong of the *Lemon* test in Establishment Clause cases. It did this largely by reading

this Court's decision in *Santa Fe* to mean more than this Court had intended.

A. The Sixth Circuit's notion of "unconstitutional taint" distorts *Lemon's* purpose prong by presuming unconstitutional purpose instead of deferring to the government's articulated purpose in the absence of a sham.

By allowing a government's *past* action to control the analysis of a *current* action's constitutionality, the Sixth Circuit shifted the standard. Its view requires a government not simply to articulate a *current* constitutional purpose, but to absolve itself from *ever* possessing a religious purpose. The Sixth Circuit's use of the "unconstitutional taint" concept presupposes present unconstitutionality, unless enough time has passed to remove the stigma. In so doing, the Sixth Circuit has refused to accept the government's articulated purpose and has treated the stated purpose with automatic suspicion simply because the actor "has a past." Such a requirement does not comport with this Court's purpose prong analysis.

The purpose prong of the *Lemon* test requires that a challenged state action have a secular purpose.[2] *Lemon v.*

[2] The *Lemon* test has three prongs: "First, the state must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13. Whether the display in question here satisfies *Lemon*'s other two prongs does not factor into the alleged applicability of prior conduct in determining current constitutional purpose.

(Continued on following page)

Kurtzman, 403 U.S. 602, 612-13 (1971). In analyzing whether a government act is constitutional with regard to its purpose, a government act that is motivated in part by a religious purpose may satisfy the purpose prong, *see, e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring), but will not satisfy it if the act "is entirely motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). As this Court has explained, a "governmental action [will be invalidated] on the ground that a secular purpose was lacking, . . . only when [this Court] has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

Indeed, courts give government considerable deference in articulating the purpose for its actions. Unless the articulated secular purpose is a sham, the purpose prong is satisfied. *See Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). In discerning whether the articulated purpose is genuine, courts have "no license to psychoanalyze" government actors and must be "cautious about attributing unconstitutional motives to state officials." *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997); *see Wallace*, 472 U.S. at 74; *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

Thus, courts are instructed to accept a government's articulated purpose unless evidence clearly indicates a

Justices of this Court have criticized *Lemon*, and the time has come for this Court to discard the *Lemon* test. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-20 (2000) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting) (explaining that "*Lemon* has had a checkered career in the decisional law of this Court" and collecting Supreme Court opinions criticizing *Lemon*).

sham. The Sixth Circuit's concept of "unconstitutional taint," however, does not defer to the government's stated purpose for a challenged act. Instead, it second-guesses the government's current purpose based on a prior allegedly unconstitutional purpose. Any similar conduct occurring within a short time of the original activity is automatically suspect. It then falls on the government not only to articulate reasons for its current conduct, but also to prove that it has rid itself of its past motives. Placing the government in this defensive position and presupposing unconstitutionality, as the Sixth Circuit has done, does not defer to the government's stated purpose, thus falling far short of the standards set forth by this Court.

Numerous cases illustrate how the purpose test is to be applied when determining whether a valid secular purpose exists. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court upheld the constitutionality of a city display that included a crèche. This Court reversed the district and circuit courts, which had held that the city's display lacked a secular purpose because of the religious nature of the crèche. *Id.* at 680. This Court affirmed the "legitimate secular purposes" of celebrating Christmas and its historical roots. *Id.* at 681. Thus, even though displaying the crèche may have had a religious motive, this Court upheld the display because the government had articulated legitimate secular purposes. *Id.*

Under *Lynch*, then, even though a religious purpose may exist for a certain display, as long as the display is not "motivated wholly by religious considerations," the display is constitutional. *Id.* at 680. This analysis illustrates the folly of applying "unconstitutional taint" to a government display. "Unconstitutional taint" inflates the significance of a previous religious purpose by focusing on it rather

than on the current purpose, and it allows the government no deference to its articulated purpose, finding a sham hiding beneath every subsequently-stated purpose.

The concept of "unconstitutional taint," moreover, ignores this Court's caution against second guessing legislative purposes and misapplies this Court's direction to ignore sham secular purposes. This Court analyzed Louisiana's "Creationism Act" in *Edwards v. Aguillard*, 482 U.S. 578 (1987). There, the Court looked beyond the Act's stated purpose of "protect[ing] academic freedom." *Id.* at 585-89. The text of the statute forbade public schools from teaching evolution unless "creation science" was also taught. *Id.* at 581. Conducting its purpose prong inquiry, this Court recognized its normal deference "to a State's articulation of a secular purpose," but affirmed the court's role in determining "that the statement of such purpose [is] sincere and not a sham." *Id.* at 586-87. This Court viewed the articulated purpose with understandable skepticism, noting that "appellants have not identified any secular purpose that was not fully served by [existing state law] before the enactment of [the statute in question]." *Id.* at 588.

In short, this Court used the text of the Creationism Act to discern that the alleged secular purpose did not align with the actual effect of the act. While claiming to promote academic freedom, the Act actually stifled teachers' freedom to develop the best curriculum possible for their classrooms by dictating that evolution could only be taught in conjunction with creationism. The "sham" uncovered by the Court appeared on the face of the challenged policy.

These facts do not parallel the alleged "sham" purpose articulated by the government actors in *McCreary*. Here, the Sixth Circuit could not rely on the contents of the current display to counter the actors' articulated secular purpose. Instead, the Sixth Circuit short-circuited the analysis by holding the actors' *original* conduct against them when their later conduct was challenged. The Sixth Circuit adopted the district court's rationale that the "defendants' overall purpose is religious in nature: to display the Ten Commandments." *McCreary Cty.*, 354 F.3d at 457. The analysis begins with the premise that the original display was "erected in violation of the Supreme Court's clear ruling in *Stone*." *Id.* Based on the district court's belief that the original conduct openly defied Establishment Clause jurisprudence, the district court held that the first display "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint. . . ."[3] *Id.*

[3] The district court's finding that a religious motive existed from the beginning is conjectural in light of the fact that *Stone v. Graham*, 449 U.S. 39 (1980), dealt exclusively with legislation requiring the posting of the Ten Commandments in every classroom. The constitutionality of courthouse representations, as in this case, has not been expressly addressed in this Court's precedent.

Given the plethora of Ten Commandments postings in courtrooms across the country, coupled with this Court's recognition of religion's unique influence in the school setting, the government's actions here appear less defiant. Interpreting the government's conduct in another light, then, places it not necessarily with an exclusively religious – and therefore unconstitutional – purpose. Indeed, it illumines the basis for the government to change its displays in accordance with what it believed the court required for a constitutional exhibit. Such an explanation would eliminate the existence of any purpose that could taint future displays.

The Sixth Circuit, thereby, imprinted a religious purpose on the *original* display and then carried that singular purpose through to the *current* display without any basis for disregarding the articulated secular purposes for the *new* display. By interpreting the purpose prong to include an "unconstitutional taint" on subsequent conduct, the Sixth Circuit has denied government the opportunity to turn unconstitutional behavior into constitutional behavior. If actions are found unconstitutional because at one point the actor allegedly possessed an unconstitutional motive, no unconstitutional action could ever be cured. The Sixth Circuit's rule is wrong and should be rejected.

B. To develop the theory of "unconstitutional taint," the Sixth Circuit expanded the limited applicability of *Santa Fe v. Doe* well beyond that case's actual scope.

The Sixth Circuit relied heavily on *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), to defend its examination of the evolution of the Ten Commandments display to determine the government's purpose. *See McCreary Cty.*, 354 F.3d at 455-58. But the Sixth Circuit interpreted *Santa Fe* to stand for a proposition well beyond how this Court used the state actor's past conduct. In *Santa Fe*, this Court held that a student-led, student-initiated invocation before football games violated the Establishment Clause because the invocation was public speech at a government-sponsored school event and thereby coerced student participation in a religious activity. During the course of litigation, the school district had implemented several changed policies regarding the practice. *Santa Fe*, 530 U.S. at 294-99 (tracing the history of the practice). The first policy required an election to determine whether the

invocation should occur and another election to select the individual to give the invocation. *Id.* at 297-98. The revised policy changed the practice's description from "invocation" and "prayer" to "invocation" or "statement" or "messages." *Id.* at 298.

This Court recognized that the most current policy violated the Constitution on its face. *Id.* at 314. In addition, it noted that the "solemnization" proposed by the school district could most assuredly only occur in the form of a prayer. *Id.* at 308-09, 314-17. This Court also noted that the new policy was simply "a continuation of the previous policies[,] dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy." *Id.* at 309. "This history," this Court concluded, "indicates that the District intended to preserve the practice of prayer before football games." *Id.*

The policy changes by the school district in *Santa Fe* were relevant to determining the purpose of the last policy simply because the identical conduct – student-led invocations before football games – was under investigation throughout the course of litigation. In contrast, the Ten Commandments display in the instant case underwent substantial substantive changes during the course of litigation. Far from being the same practice under a different name, the Ten Commandments display evolved from a single copy of the Ten Commandments to a collection of secular and religious historical and legal documents (the contents of which underwent two changes). In *Santa Fe*, the government actor made no effort to enforce the new policy by failing to hold new elections; the school district only made "cosmetic alterations" to the actual contested

practice. In contrast, the government actors in this case fundamentally altered the nature of the exhibit. Its current conduct is not the same allegedly unconstitutional conduct that it first undertook.

The mere presence of the Ten Commandments in each of the displays does not indicate a continuing constitutionally-suspect purpose. By the Sixth Circuit's own admission, and based on this Court's discussion in *Stone v. Graham*, 449 U.S. 39 (1980), the Ten Commandments can be displayed in a constitutional manner. *McCreary Cty.*, 354 F.3d at 448-49, 459 ("*Stone* established no *per se* rule that displaying the Ten Commandments in an educational setting is unconstitutional."). Thus, the Ten Commandments continuing presence in the display cannot in itself be the basis for investigating beyond the government's *current* stated purpose for the display. By suggesting that the government's original conduct taints every subsequent display, the Sixth Circuit has misdirected the proper inquiry into the government's purpose.

II. GOVERNMENTS MAY ACT TO REMEDY THEIR IMPERMISSIBLE PURPOSES WITHOUT INCURRING THE "UNCONSTITUTIONAL TAINT" SUGGESTED BY THE SIXTH CIRCUIT.

Rather than focus solely on the constitutionality of its present purpose, the Sixth Circuit's notion of "unconstitutional taint" requires a government to display a constitutional exhibit the first time around or forever be imprinted with the stigma of unconstitutional tendencies.

This Court, and other courts, have found that one display does not infect another. Further, governments

faced with the ambiguity of Establishment Clause jurisprudence should not be denied the freedom to take instruction from prior decisions to comport their conduct with the Constitution.

A. When examining the constitutionality of a particular government act, courts examine the purpose underlying each government act individually.

Prudence dictates that the purpose for government actions be analyzed independently for each government act. The case of *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), illustrates that an unconstitutional purpose underlying one act does not necessarily imprint a simultaneous act with the same impermissible purpose. Following the example established in *Allegheny*, the Third Circuit has separately analyzed the purpose underlying subsequent acts by the same government, and the Third Circuit does not allow an original unconstitutional purpose to alter the constitutionality of a subsequent display.

In *Allegheny*, this Court confronted two holiday displays found on public property in Pittsburgh. Located in a focal point of the Allegheny County Courthouse, the first display included a crèche, a banner reading "Gloria in Excelsis Deo!," poinsettias, a Christmas tree, and a plaque stating the name of the organization donating the display. *Id.* at 579-80. A majority of this Court held that this display violated the Establishment Clause. *Id.* at 621. The second display, located outside the City-County Building, depicted a large Christmas tree, Chanukah menorah, and a sign reading "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our

legacy of freedom." *Id.* at 581-82. A majority found that the display was constitutional. *Id.* at 621. The two displays were analyzed separately and none of the justices suggested that because one display was unconstitutional, the other display was "tainted" by the same purpose. Instead, each display, and the purpose behind it, was analyzed in terms of its own content.

The Third Circuit, applying these principles in *ACLU v. Schundler,* 168 F.3d 92 (3rd Cir. 1999), spurned the argument that Jersey City's "prior history" should be taken into account when analyzing the city's purpose behind modifying a Christmas holiday display. For decades, Jersey City exhibited a holiday display that featured a menorah and a Christmas tree. *Id.* at 94-95. The district court permanently enjoined the display as a violation of the Establishment Clause. *Id.* at 95. After the injunction was ordered, Jersey City erected a modified display that included "not only a crèche, a menorah, and Christmas tree, but also large plastic figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols on the tree." *Id.* at 95. The city also posted signs indicating that the display was "one of a series . . . put up by the City throughout the year to celebrate its residents' cultural and ethnic diversity." *Id.*

The plaintiffs had argued:

> Jersey City's addition of the secular symbols was "a ploy designed to permit continued display of the religious symbols." The suggestion seems to be that, even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the city officials were motivated by a desire to evade

> constitutional requirements and that this motivation required invalidation of the modified display.

Id. at 105. Rejecting this contention, the Third Circuit stated,

> [t]he mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. (internal citations omitted). The Third Circuit recognized that this Court's

> decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith.

Id.

A similar minefield of constitutionality exists for many Establishment Clause cases, especially in interpreting *Lemon*'s purpose prong. This Court has frequently remarked upon the test's inherent shortcomings.[4] As such, a government's initial attempt to comport with the Constitution should not later be used against it when that initial attempt turns out to be contrary to the requirements of

[4] *See*, n. 2, *supra*.

the Establishment Clause. By using the concept of "unconstitutional taint," the Sixth Circuit has allowed one constitutionally-suspect purpose to eternally poison the purpose behind any similar subsequent display, a concept this Court must reject.

B. Given the difficulty of Establishment Clause analysis, courts routinely allow governments to modify conduct to comply with the Constitution without having their originally suspect purposes held against them.

This Court's jurisprudence has long recognized that governments initially acting unconstitutionally are free to change their conduct to conform to the Constitution. If the future conduct is challenged, courts focus solely on the constitutionality of that conduct and do not mark the actor with a scarlet stain of permanent suspicion. This fundamental legal principle has been incorporated into the Court's Establishment Clause jurisprudence. The cases supporting this principle are too numerous to detail, but a few examples are particularly insightful for demonstrating that "unconstitutional taint," in the words of the *McCreary* dissent, "offends common sense." *McCreary Cty.*, 354 F.3d at 477 (Ryan, J., dissenting). An actor may initially engage in unconstitutional conduct or with suspect purpose without having that fact used against him when analyzing the constitutionality of similar conduct or purpose.

On numerous occasions, a government has initiated a particular policy or conduct for wholly religious purposes, yet over time additional secular or historical reasons for continuing the practice emerged. As this Court has stated, governments may "retai[n] [a] la[w] for the permissible purpose of furthering overwhelmingly secular ends" even

though the original purpose was wholly religious in nature. *Schempp*, 374 U.S. at 263-64. For example, in *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court upheld Sunday closure laws even though they were originally enacted for religious ends.

Similarly, in the holiday display cases, this Court did not examine the government's original purpose for displaying religious symbols in its Christmas displays. The relevant inquiry was the purpose for maintaining the practice during the *current* holiday season. Even though the original purpose may have been dominated by a religious purpose, because the current displays included important secular purposes, the displays passed Establishment Clause scrutiny. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

In each case, the original purpose did not taint the later articulated purposes. The same conduct originally practiced for religious purposes was upheld because the government now had a legitimate secular purpose. Despite the government's original religious purpose, this Court did not summarily dismiss a genuine, but only later articulated, secular purpose. If the purpose underlying the exact same conduct can be changed without poisoning that act, then the purpose behind changed conduct should not poison the modified act.

Several circuit courts examining modified displays have recognized that governments should be free to change their conduct and articulate legitimately secular reasons for acting even if their original purpose was constitutionally suspect. In the Sixth Circuit case of *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), the

defendant government officials adopted holiday closing schedules that included Good Friday. On her own initiative, a government employee posted signs with an image of the crucifixion announcing that the building would be closed "for observance of Good Friday." *Id.* at 571.

Plaintiffs sued to have the signs removed, after which the government removed the Good Friday signs and replaced them with signs announcing a closing for the same day in honor of a "Spring Holiday." *Id.* The Sixth Circuit affirmed the secular purpose for closing government offices on Good Friday and allowed the closures to continue even though the original display indicated a religious purpose. *Id.* at 578. Dismissing the Good Friday observance's relevance to determining the purpose of the spring holiday closures, the court stated, "the fact that a particular closing was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Id.* at 574; *id.* at 576 ("[W]e hold that the sign posted for several days . . . did not permanently taint the closings. . . . "); *see also Metzl v. Leininger*, 57 F.3d 618, 624 (7th Cir. 1995) (where despite affirming the unconstitutionality of a similar Good Friday closure law, the United States Court of Appeals for the Seventh Circuit expressed with confidence that the state could reinstate the exact same practice "by officially adopting a 'spring weekend' rationale for the law, in place of the governor's proclamation of a state *religious* holiday, or by moving to a system of local option for school districts"); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (where the purpose for the holiday had become sufficiently secularized so as to pass constitutional muster despite any originally predominant religious purpose).

Analyzing *Granzeier*, it seems incredulous that the same circuit court would draw an antithetical conclusion in *McCreary*. Rather than find that "the fact that a particular [display] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form," the Sixth Circuit stated in *McCreary* that the original display tainted the subsequent displays with a primarily religious purpose. The purpose analysis in *Granzeier* and *McCreary* should have been based on the same criteria. In both cases, religious motives may have driven the original posting, but in both cases a legitimate primary secular purpose undergirded later conduct.

In *Granzeier*, the Sixth Circuit declined to read anything into the fact that the government closing still occurred on Good Friday. Because there were valid secular reasons for the closing, the practice was held constitutional. The government achieved the same result (offices being closed on Good Friday) through constitutional means merely by changing the language of a sign. Consequently, the alleged unconstitutional sign had no bearing on the current practice under suspicion. This reasoning applies with even greater weight in *McCreary*, where not only the label given to a particular display changed, but also the very contents of the conduct in question expanded. Here, the result of the change fundamentally altered the nature of the conduct and made it constitutional. To be logically consistent then, if no "unconstitutional taint" applied to the government actor in *Granzeier*, none should apply against the actors in *McCreary*.

Before issuing its decision in *McCreary*, the Sixth Circuit had indicated that a previously unconstitutional purpose for a Ten Commandments display would not prevent a modified exhibit from being held constitutional.

In *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), plaintiffs challenged a Kentucky legislative resolution relocating a monument inscribed with the Ten Commandments to a permanent site on the capitol grounds. The monument was to be part of a "historical and cultural display," but no other such monuments (with the exception of a floral clock) were yet on the premises. *Id.* at 477. Responding to the litigation, the legislature announced some of the intended accompanying monuments that would be added to the display. *Id.* Although the Sixth Circuit held that the monument standing by itself violated the Establishment Clause, it confidently expressed that "with careful planning and deliberation, and perhaps consultation with the plaintiffs, the Commonwealth can permissibly display the monument in question." *Id.* at 490.

The court in *Adland* encouraged the government to create a constitutional display that would comply with the Establishment Clause, but in *McCreary* the same court penalized the government for undertaking just such an endeavor. If any subsequent displays that would include the Ten Commandments would be forever tainted by the original display containing only the Ten Commandments monument, the *Adland* court never should have explained that a constitutional display was possible.

In effect, the purpose behind the original *McCreary* display and the *Adland* display – in the Sixth Circuit's view – was primarily religious. In *Adland*, then, the court suggests that the Ten Commandments may be displayed in a broader context. The *McCreary* decision analyzes just such a broader context – the challenged exhibit features a variety of historical and legal documents, both religious and secular. Yet in finding an improper purpose behind the new display, the Sixth Circuit in *McCreary* relies heavily

upon the original display and its alleged primary religious purpose. The Sixth Circuit's holding in *McCreary* ignores the clear precedent from this Court that a government's purpose for acting can evolve over time without penalty.

As Judge Boggs correctly stated in his dissent from the denial of a motion to rehear *McCreary*, "governmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law." *ACLU v. McCreary Cty.*, 361 F.3d 928, 933 (6th Cir. 2004). The notion of "unconstitutional taint" denies governments this basic right. The Sixth Circuit erred in holding that the government's original, allegedly unconstitutional purpose cast suspicion on the purpose underlying future displays that included the Ten Commandments.[5]

[5] The Seventh Circuit has also rejected the idea of "unconstitutional taint" and has recognized that unconstitutional conduct by one individual does not preclude the same conduct being conducted by another individual possessing a constitutional purpose. In *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992), litigation began when the City of Ottawa displayed sixteen paintings depicting the life of Christ in a city park. *Id.* at 612-15. The district court held that this action violated the Establishment Clause and permanently enjoined any future display of such paintings in the park. *Id.* at 617. In reversing the decision, the Seventh Circuit stated, "[the injunction] implies that once the government impermissibly endorses religious speech (e.g., the paintings), that particular speech becomes poisoned and no private party may thereafter express that view." *Id.* at 621. Citing numerous cases where the government has been allowed to cure previously unconstitutional behavior, the Seventh Circuit rejected the proposition that unconstitutional conduct permanently taints future conduct with the same unconstitutionality. *Id.*

CONCLUSION

For the above-stated reasons, and for the reasons stated in the petitioner's brief, this Court should reverse the judgment below.

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December 8, 2004

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Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 03-1693

In The

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners,

v.

ACLU OF KENTUCKY, ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

SUMMARY OF THE ARGUMENT

The Ten Commandments have both religious and historical significance. This brief will explain how each one of the Ten Commandments has historically impacted American law and jurisprudence and thus, why the Ten Commandments should be permitted to be displayed with other political and patriotic documents.

In this regard, this Brief will greatly expand upon the information contained in Petitioner's Brief.

[1] The parties have consented to the filing of this brief. A copy of the letter of consent from Respondent has been lodged with the Clerk of the Court. A copy of the letter of consent from Petitioner accompanies this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curia, its members, and its counsel.

ARGUMENT

I. TWO AUTHORITATIVE VOICES ESTABLISH THAT THE TEN COMMANDMENTS HISTORICALLY IMPACTED AMERICAN LAW AND JURISPRUDENCE: COLONIAL, AND EARLY NATIONAL LAWS; AND CONTEMPORARY COURT DECISIONS.

The District Court focused on the religious element of the Ten Commandments, while ignoring the historical significance of the Ten Commandments, stating "[t]he reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code . . . ." *ACLU of Kentucky v. McCreary Co.*, 145 F. Supp. 2d 845, 851 (E.D. Ky. 2001). The Court of Appeals while "taking issue" with some of the lower court's reasoning, ultimately agreed that the "predominant purpose' was religious and therefore unconstitutional. *ACLU of Kentucky v. McCreary Co.*, 354 F.3d 438, 447 (6th Cir. 2003). However, there is nothing incompatible nor—more importantly—unconstitutional about a religious document having real, valid, and enormous historical significance, also.

This brief will concentrate on this one aspect of the opinion below, in order to explain why the historical significance of the Ten Commandments helps render their display constitutional. The brief will explain how each one of the Ten Commandments has historically

impacted American law and jurisprudence and thus, why the Ten Commandments should be permitted to be displayed with other political and patriotic documents.

Every one of the Ten Commandments was enacted into the laws of the colonies and molded the common law of the colonies.[2]

A. The first commandment, "Have No Other Gods," has impacted American law and jurisprudence.

The first commandment was historically incorporated into American law. For example, the first commandment was incorporated into the first written law code in America by the Virginia colony. A 1610 law from the Virginia colony declared the following:

> [S]ince we owe our highest and supreme duty, our greatest and all our allegiance to Him from whom all power and authority is derived, and flows as from the first and only fountain, and being especially soldiers

[2] For the purpose of this *amicus* brief, the commandments of the Ten Commandments as listed in the Bible Exodus 20:3-17 and Deuteronomy 5:7-21 (and in a shortened version in Exodus 34:14-28) will be summarized as:

1. Have no other gods.
2. Have no idols.
3. Honor God's name.
4. Honor the Sabbath day.
5. Honor your parents.
6. Do not murder.
7. Do not commit adultery.
8. Do not steal.
9. Do not perjure yourself.
10. Do not covet.

> impressed in this sacred cause, we must alone expect our success from Him who is only the blesser of all good attempts, the King of kings, the Commander of commanders, and Lord of hosts, I do strictly command and charge all Captains and Officers of what quality or nature soever, whether commanders in the field, or in town or towns, forts or fortresses, to have a care that the Almighty God be duly and daily served, and that they call upon their people to hear sermons, as that also they diligently frequent morning and evening prayer themselves by their own example and daily life and duties herein, encouraging others thereunto.

Articles, Laws, and Orders, Divine, Politic and Martial for the Colony of Virginia (1610-1611), *reprinted in Colonial Origins of the American Constitution: A Documentary History* 315-316 (David S. Lutz ed., 1998) [hereinafter *Colonial Origins*]. Additionally, the very first law in Massachusetts' legal code was based on the first commandment. "If any man after legal conviction shall have or worship any other god but the Lord God, he shall be put to death. Deut. 13.6, 10, Deut. 17.2, 6, Ex. 22.20." *Massachusetts Body Of Liberties* (1641), *reprinted in Colonial Origins, supra*, at 83. Connecticut also made the first commandment its first law. "If any man after legal conviction shall have or worship any other god but the Lord God, he shall be put to death (Duet. 13.6 and 17.2, Ex. 22.20)." *Capital Laws of Connecticut* (1642), *reprinted in Colonial Origins,*

supra, at 229. These are just a few of the examples that affirm the first commandment's role in the history of American law.

B. The second commandment, "Have no idols." has impacted American law and jurisprudence.

The second commandment also historically impacted American law. Just one example is New Hampshire's 1680 law prohibiting idolatry, which is typical of the colonies' idolatry laws. "It is enacted by ye Assembly and ye authority thereof, yet if any person having had the knowledge of the true God openly and manifestly have or worship any other god but the Lord God, he shall be put to death. Ex. 22.20, Deut. 13.6 and 10." *General Laws and Liberties of New Hampshire* (1680), *reprinted in Colonial Origins, supra*, at 6.

C. The third commandment, "Honor God's name," has impacted American law and jurisprudence.

The third commandment also historically shaped American law and jurisprudence. Laws enacted to observe the third commandment were organized into two categories: laws prohibiting blasphemy and laws prohibiting swearing and profanity. Noah Webster, an American legislator and judge, affirmed that both of these categories of law were derived from the third commandment:

> When in obedience to the third commandment of the Decalogue you would avoid profane swearing, you are to remember that this alone is not a full compliance with the prohibition which

> [also] comprehends all irreverent words or actions and whatever tends to cast contempt on the Supreme Being or on His word and ordinances [i.e., blasphemy].

Noah Webster, *Letters to a Young Gentleman* 8 (1823); *see also* Noah Webster, *A Collection of Papers* 296 (1843). Colonies enacted laws that embodied these two categories. For example, a 1610 Virginia law declared — "[t]hat no man speak impiously or maliciously against the holy and blessed Trinity or any of the three persons . . . upon pain of death. That no man blaspheme God's holy name upon the pain of death." *Articles, Laws, and Orders, Divine, Politic, and Martial for the Colony of Virginia* (1610-1611), *reprinted in Colonial Origins*, *supra*, at 316. Similarly, a 1639 Connecticut law declared that

> [i]f any person shall blaspheme the name of God the Father, Son, or Holy Ghost, with direct, express, presumptuous or high-handed blasphemy, or shall curse in the like manner, he shall be put to death. Lev. 24.15, 16.

The Code of 1650, at 28-29. Other colonies passed similar laws: Massachusetts in 1641, *Massachusetts Body Of Liberties* (1641), *reprinted in Select Charters and Other Documents Illustrative of American History, 1606-1775* 87 (William MacDonald ed., 1993) [hereinafter *Select Charters*]; *Connecticut in 1642, Capital Laws of Connecticut* (1642), *reprinted in Colonial Origins*, *supra*, at 230; New Hampshire in

1680, *General Laws and Liberties of New Hampshire* (1680), *reprinted in Colonial Origins*, *supra*, at 6; Pennsylvania in 1682, *An Act for Freedom of Conscience* (Pennsylvania, 1682), *reprinted in Colonial Origins*, at 289; Pennsylvania in 1700, *An Abridgment of the Laws of Pennsylvania* 32 (Collinson Read ed., 1801); Pennsylvania in 1741, *An Act to Prevent the Grievous Sins of Cursing and Swearing within this Province and Territories*, *reprinted in* 1 *Laws of the Commonwealth of Pennsylvania* 7 (1810); South Carolina in 1695, *Blasphemy-Profaneness* (1695), *reprinted in* 1 *Alphabetical Digest of the Public Statute of South Carolina* 87-88 (Joseph Brevard ed., 1814); and North Carolina in 1741, *Vice and Immorality* (1741), *reprinted in A Manual of The Laws of North Carolina, Arranged Under Distinct Heads, In Alphabetical Order* 264 (John Haywood ed., 1814).

Prominent Framers also enforced the third commandment. For example, Commander-in-Chief George Washington issued numerous military orders during the American Revolution that first prohibited swearing and then ordered an attendance at Divine worship, thus relating the prohibition against profanity to a religious duty. Typical of these orders is Washington's declaration on July 4, 1775.

> The General most earnestly requires and expects a due observance of those articles of war established for the government of the army which forbid profane cursing, swearing, and drunkenness; and in like manner requires and expects of all officers and soldiers not engaged on actual duty, a

> punctual attendance on Divine Service to implore the blessings of Heaven upon the means used for our safety and defense.

George Washington, *General Orders, Head-Quarters, Cambridge, July 4, 1775 in* 3 *The Writings of George Washington* 309 (John C. Fitzpatrick ed., 1931).

The third commandment also affected the history of American jurisprudence. Judge Zephaniah Swift, author of the first legal text published in America, explained why civil authorities enforced the third commandment's prohibition against blasphemy and profane swearing:

> Crimes of this description are not punishable by the civil arm merely because they are against religion. Bold and presumptuous must he be who would attempt to wrest the thunder of heaven from the hand of God and direct the bolts of vengeance where to fall. The Supreme Deity is capable of maintaining the dignity of His moral government and avenging the violations of His holy laws. His omniscient mind estimates every act by the standard of perfect truth and His impartial justice inflicts punishments that are accurately proportioned to the crimes. But short-sighted mortals cannot search the heart and punish according to the intent. They can only judge by overt acts and punish them as they respect the peace and happiness of civil society. This is the rule

> to estimate all crimes against civil law and is the standard of all human punishments. It is on this ground only that civil tribunals are authorized to punish offences against religion.

Zephaniah Swift, 2 *A System of the Laws of the State of Connecticut,* 320 (1796).

The laws against blasphemy and profanity based on the third commandment continued beyond the Founding Era. During the eighteenth and nineteenth century, several states passed laws based on the third commandment: Connecticut in 1784, An Act for the Punishment of Divers Capital and Other Felonies, 1 *The Public Statute Laws of the State of Connecticut* 295-96 (1808); New Hampshire in 1791, An Act for the Punishment of Profane Cursing and Swearing, *The Laws of the State of New Hampshire, the Constitution of the State of New Hampshire, and the Constitution of the United States, with its Proposed Amendments* 280-81 (1797) (passed February 6, 1791); *Id.* at 286-87 (a separate act passed February 10, 1791); *see also* An Act for the Punishment of Certain Crimes not Capital, *Constitution and Laws of the State of New-Hampshire; Together with the Constitution of the United States* 277 (1805) (passed February 16, 1791); Vermont in 1791, An Act for the Punishment of Drunkenness, Gaming, and Profane Swearing, *Statutes of the State of Vermont* 51 (1791) (passed February 28, 1787); An Act for the Punishment of Divers Capital and other Felonies, *Id.* at 75 (passed March 8, 1787); Virginia in 1792, *A Digest of the Laws of Virginia, which are of a Permanent Character and General Operation* 453-54 (Joseph Tate

ed., 1823); *see also* An Act for the Effectual Suppression of Vice, and Punishing the Disturbers of Religious Worship and Sabbath Breakers, 1 *The Revised Code of the Laws of Virginia: Being A Collection of all such Acts of the General Assembly, of a Public and Permanent Nature as are now in Force*, 554-56 (1819); Pennsylvania in 1794, Act of April 22, 1794, *An Abridgment of the Laws of Pennsylvania* 380 (1801); Maine in 1821, Jeremiah Perley, *The Maine Justice: Containing the Laws Relative to the Powers and Duties of Justices of the Peace* 7, 236 (1823), *see also* An Act Against Blasphemy and Profane Cursing and Swearing, *Laws of the State of Maine* 66-67 (1822) (passed February 24, 1821); Tennessee in 1834, Breaking the Sabbath, *reprinted in* James Coffield Mitchell, *The Tennessee Justice's Manual and Civil Officer's Guide* 428 (1834); Massachusetts in 1835, Title VII: Of Towns and Town Officers, Section 76, *The Revised Statutes of the Commonwealth of Massachusetts,* 185 (1836) (passed November 4, 1835); and New York in 1836, "Of Profane Cursing and Swearing," Rev. Stat. 673, Art 6, *reprinted in* George C. Edwards, *Treatise of the Powers and Duties of the Justices of the Peace and the Town Officers in the State of New York* 379-80 (1836).

In 1824, the Supreme Court of Pennsylvania reaffirmed that the laws against blasphemy were derived from divine law. "The true principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; so that a person vilifying, subverting or ridiculing them may be prosecuted at common law." *Updegraph v. Commonwealth,* 11 Serg. & Rawle 393, 401 (Pa. 1824). The court then noted that Pennsylvania's laws against

blasphemy had been drafted by James Wilson, a signer of the Constitution and original Justice of this Court:

> The late Judge Wilson, of the Supreme Court of the United States, Professor of Law in the College in Philadelphia, was appointed in 1791, unanimously by the House of Representatives of this State to "revise and digest the laws of this commonwealth. . . . " He had just risen from his seat in the Convention which formed the Constitution of the United States, and of this State; and it is well known that for our present form of government we are greatly indebted to his exertions and influence. With his fresh recollection of both constitutions, in his course of Lectures (3d vol. of his works, 112), he states that profaneness and blasphemy are offences punishable by fine and imprisonment, and that Christianity is part of the common law. It is vain to object that the law is obsolete; this is not so; it has seldom been called into operation because this, like some other offences, has been rare. It has been retained in our recollection of laws now in force, made by the direction of the legislature, and it has not been a dead letter.

Id. at 403. This Court in *Church of Holy Trinity v. United States*, 143 U.S. 457, 470-71 (1892) subsequently invoked the authority of and endorsed this

Supreme Court of Pennsylvania decision. The third commandment's influence on profanity and blasphemy laws was reaffirmed by subsequent courts, such as the 1921 Supreme Court of Maine in *State* v. *Mockus*, 14 ALR 871, 874 (Maine Sup. Jud. Ct., 1921) and the 1944 Florida Supreme Court in *Cason* v. *Baskin*, 20 So. 2d 243, 247 (Fla. 1944) (*en banc*).

D. The fourth commandment, "Honor the Sabbath," has impacted American law and jurisprudence.

The fourth commandment historically impacted American law and jurisprudence. While a representative sampling will be presented below, there are three points that clearly establish the effect of the fourth commandment on American law.

First is the inclusion in the U.S. Constitution of the recognition of the Sabbath in Art. I, Sec. 7, ¶ 2, stipulating that the President has ten days to sign a law, "Sundays excepted." The "Sundays excepted" clause had previously appeared in the individual State constitutions of that day, and therefore, when incorporated into the U. S. Constitution, carried the same meaning that had been established by traditional usage in the States. That meaning was then imparted into the constitutions of the various States admitted into the Union subsequent to the adoption of the federal Constitution. The historical understanding of this clause was summarized in 1912 by the Supreme Court of Missouri which, expounding on the meaning of this provision in its own State constitution and in the United States Constitution, declared:

It is provided that if the Governor does not return a bill within 10 days (Sundays excepted), it shall become a law without his signature. Although it may be said that this provision leaves it optional with the Governor whether he will consider bills or not on Sunday, yet, regard being had to the circumstances under which it was inserted, can any impartial mind deny that it contains a recognition of the Lord's Day as a day exempted by law from all worldly pursuits? The framers of the Constitution, then, recognized Sunday as a day to be observed, acting themselves under a law which exacted a compulsive observance of it. If a compulsive observance of the Lord's Day as a day of rest had been deemed inconsistent with the principles contained in the Constitution, can anything be clearer than, as the matter was so plainly and palpably before the Convention, a specific condemnation of the Sunday law would have been engrafted upon it? So far from it, Sunday was recognized as a day of rest.

State v. Chicago, 143 S.W. 785, 803 (Mo. 1912).

The second point concerning the impact of the fourth commandment on American law is seen in states recognizing the Sabbath as evidenced in their civil process law. For example, a 1830 New York law declared that "Civil process cannot, by statute, be executed on Sunday, and a service of such process on

Sunday is utterly void and subjects the officer to damages." *General Rules Applicable to a Summons, Warrant of Attachment*, Rev. Stat. 675, *reprinted in* Edwards, *Justices of the Peace . . . in the State of New York,* at 38. Similar laws may be found in Pennsylvania in 1862, *Charter of Liberties and Frame of Government of the Province of Pennsylvania in America* (1682), *reprinted in Colonial Origins, supra*, at 281; Pennsylvania in 1705, An Act to Restrain People from Labor on the First Day of the Week, 1 *Laws of the Commonwealth of Pennsylvania* 25 (1810) (passed October 14, 1705); Vermont in 1787, An Act for the Due Observation of the Sabbath, *Statutes of the State of Vermont* 157 (1791) (passed March 9, 1787); Connecticut in 1796, *Of Crimes Against Religion*, *reprinted in* Swift, 2 *A System of the Laws* 326 (1796); and New Jersey in 1798, An Act for Suppressing Vice and Immorality, *Laws of the State of New Jersey, Revised and Published Under the Authority of the Legislature* 329-330 (William Paterson ed., 1800) (passed March 16, 1798).

The third point concerning the impact of the fourth commandment on American law and jurisprudence is found in the United States Supreme Court's declaration that Sabbath laws remain constitutional today. *McGowan* v. *Maryland*, 366 U.S. 420 (1961). Similarly, during the twentieth century several state courts have acknowledged that the Sabbath laws were derived from the fourth commandment. For example, the Supreme Court of Pennsylvania in 1967 did a thorough exegesis of Sabbath laws and concluded:

> Remember the Sabbath day to keep it holy; six days shalt thou labor and do all thy work; but the seventh day ~~is the~~ Sabbath of the Lord thy God. In it thou shalt not do any work." This divine pronouncement became part of the Common Law inherited by the thirteen American colonies and by the sovereign States of the American union.

Bertera's Hopewell Foodland, Inc. v. *Masters,* 236 A.2d 197, 200-01 (Pa. 1967). Other state courts have made similar declarations: Florida in *Gillooley* v. *Vaughn,* 110 So. 653, 655 (Fla. 1926); Georgia in *Rogers* v. *State,* 4 S.E.2d 918, 919 (Ga. Ct. App. 1939); Minnesota in *Brimhall* v. *Van Campen,* 8 Minn. 1 (1858); Mississippi in *Paramount-Richards Theatres* v. *City of Hattiesburg,* 49 So. 2d 574, 577 (Miss. 1950); and New York in *People* v. *Rubenstein,* 182 N.Y.S.2d 548, 550 (N.Y. Ct. Sp. Sess. 1959).

The fourth commandment was also enacted into law. Examples of the early implementation of the fourth commandment into law are seen in the Virginia laws of 1610, *Articles, Laws, and Orders, Divine, Politic and Martial for the Colony of Virginia, reprinted in Colonial Origins,* at 316-17; the New Haven laws of 1653, Charles J. Hoadly, *Records of the Colony or Jurisdiction of New Haven, From May, 1653, to the Union, Together With the New Haven Code of 1656,* at 605 (1858); the New Hampshire laws of 1680, *General Laws and Liberties of New Hampshire, reprinted in Colonial Origins,* at 10-11; the Pennsylvania laws of 1682, *An Act for Freedom of Conscience, reprinted in Colonial*

Origins, at 288; and the Pennsylvania laws of 1705, *An Act to Restrain People from Labor on the First Day of the Week,* 1 *Laws of the Commonwealth of Pennsylvania,* 25-26 (1810) (passed October 4, 1705), *see also Abridgement of the Laws of Pennsylvania* 362 (1801); the South Carolina laws of 1712, Title 160: Sunday, 2 *Alphabetical Digest of the Public Statute Law of South Carolina* 272-75 (1814); the North Carolina laws of 1741, Vice and Immorality, *A Manual of The Laws of North Carolina* 264 (1814); the Connecticut laws of 1751, An Act for the Due Observation of the Sabbath, or Lord's Day, 1 *The Public Statute Laws of the State of Connecticut* 577-78 (1808), *see also* Swift, 2 *A System of the Laws* (1796) 325-26. During the Federal Era and well beyond, states continued to enact and reenact Sabbath laws. In fact, the States went to impressive lengths to uphold the Sabbath. For example, in 1787, Vermont enacted a ten-part law to preserve the Sabbath, An Act for the Due Observation of the Sabbath, *Statutes of the State of Vermont* 155-57 (1791) (passed March 9, 1787). In 1791, Massachusetts enacted an eleven-part law, Of the Observance of the Lord's Day and the Prevention and Punishment of Immorality, *The Revised Statutes of the Commonwealth of Massachusetts* 385-86 (1836) (passed November 4, 1835). In 1792, Virginia enacted an extensive eight-part law, An Act for the Effectual Suppression of Vice, and Punishing the Disturbers of Religious Worship, and Sabbath Breakers, 1 *The Revised Code of the Laws of Virginia* 554-56 (1819) (passed December 26, 1792), *see also A Digest of the Laws of Virginia* 453-54 (1823). In 1798, New Jersey enacted a twenty-one-part law, An Act for Suppressing Vice and Immorality, *Laws of the*

State of New Jersey 329-33 (1800) (passed March 16, 1798). In 1799, New Hampshire enacted a fourteen-part law, An Act for the Better Observation of the Lord's Day, and for Repealing All the Laws Heretofore Made for that Purpose, *reprinted in Constitution and Laws of the State of New Hampshire* 290-93 (1805) (passed December 24, 1799). In 1821, Maine enacted a thirteen-part law, An Act Providing for the Due Observation of the Lord's Day, *reprinted in Laws of the State of Maine* 67-71 (1822) (passed December 24, 1799).

These and numerous other examples prove that the fourth commandment historically shaped American law and jurisprudence.

E. The fifth commandment, "Honor your parents," has impacted American law and jurisprudence.

The fifth commandment historically affected American law and jurisprudence. Many early state codes cited both the fifth commandment and additional Bible verses as the basis for their laws related to honoring parents. For example, a 1642 Connecticut law declared that

> If any child or children above sixteen years old, and of sufficient understanding shall curse or smite their normal father or mother, he or they shall be put to death; unless it can be sufficiently testified that the parents have been very unchristianly negligent in the education of such children, or so provoke them by extreme and cruel correction that they have been forced

> thereunto to preserve themselves from death [or] maiming. Ex. 21:17, Lev. 20, Ex. 20:15.

The Code of 1650, at 29; *see also Capital Laws of Connecticut, reprinted in Colonial Origins, supra,* at 230.

Even three centuries after these early legal codes, state courts were still citing the fifth commandment as the basis for the public policy between parents and children. For example, in 1934, a Louisiana appeals court stated: "'Honor thy father and thy mother,' is as much a command of the municipal law as it is a part of the Decalogue, regarded as holy by every Christian people. 'A child,' says the code, 'whatever be his age, owes honor and respect to his father and mother.'" *Ruiz* v. *Clancy,* 157 So. 737, 738 (La. Ct. App. 1934) (citing *Caldwell* v. *Henmen,* 5 Rob. 20 (La. 1843). These and numerous other examples demonstrate that the fifth commandment historically impacted American law and jurisprudence.

F. The sixth commandment, "Do not murder," has impacted American law and jurisprudence.

The sixth commandment exerted substantial force on American law and jurisprudence. The sixth commandment influenced American criminal laws. For example, a 1641 Massachusetts law declared:

> 4. 21.12, Numb. 35.13, 14, 30, 31. If any person commit any willful murder, which is manslaughter committed upon premeditated malice, hatred, or cruelty,

> not in a man's necessary and just defense nor by mere casualty against his will, he shall be put to death.
>
> 5. b. 25.20, 21. Lev. 24.17. If any person slayeth another suddenly in his anger or cruelty of passion, he shall be put to death.
>
> 6. Ex. 21.14. If any person shall slay another through guile, either by poisoning or other such devilish practice, he shall be put to death.

Massachusetts Body Of Liberties (1641), *reprinted in Select Charters, supra*, at 87-88.

Courts have also traced murder laws to the sixth commandment. For example, in 1932 a Kentucky appeals court declared:

> The rights of society as well as those of appellant are involved and are also to be protected, and to that end all forms of governments following the promulgation of Moses at Mt. Sinai has required of each and every one of its citizens that "Thou shalt not murder." If that law is violated, the one guilty of it has no right to demand more than a fair trial, and if, as a result thereof, the severest punishment for the crime is visited upon him, he has no one to blame but himself.

Young v. *Commonwealth,* 53 S.W. 963, 966 (Ky. Ct. App. 1932).

Other courts have recognized the sixth commandment as the historical root in murder laws. *See, e.g., Matter of Storar*, 434 N.Y.S.2d 46, 48 (N.Y. App. Div. 1980) (Caardamone, J., dissenting); *Ex parte Mei,* 192 A. 80, 82 (N.J. 1937). These and numerous other examples prove that the sixth commandment impacted American law and jurisprudence.

G. The seventh commandment, "Do not commit adultery," has impacted American law and jurisprudence.

The seventh commandment also historically influenced American law and jurisprudence. Several colonies and states cited the seventh commandment for their adultery laws. For example, a 1641 Massachusetts law stated that "If any person committeth adultery with a married or espoused wife, the adulterer and adulteresses shall surely be put to death. Ex. 20.14." *Massachusetts Body Of Liberties*, *reprinted in Colonial Origins, supra,* at 84. Nearly half-a-century later, Vermont enacted an adultery law based on divine law.

> Whereas the violation of the marriage covenant is contrary to the command of God and destructive to the peace of families: be it therefore enacted by the general assembly of the State of Vermont that if any man be found in bed with another man's wife, or woman with another's husband, . . . &c.

An Act Against Adultery, Polygamy, and Fornication, *Statutes of the State of Vermont* 16-17 (1791) (passed March 8, 1787).

Centuries later, courts were still using the seventh commandment as the basis for enforcing their State statutes on adultery. For example, in 1898, the highest criminal court in Texas proclaimed that the Texas state law on adultery was derived from the seventh commandment: "The accused would insist upon the defense that the female consented. The state would reply that she could not consent. Why? Because the law prohibits, with a penalty, the completed act. 'Thou shalt not commit adultery' is our law as well as the law of the Bible." *Hardin* v. *State*, 46 S.W. 803, 808 (Tex. Crim. App. 1898). In 1955, the Washington Supreme Court also declared that the seventh commandment was the basis for its adultery laws. "Adultery, whether promiscuous or not, violates one of the Ten Commandments and the statutes of this State." *Schreifels* v. *Schreifels,* 287 P.2d 1001, 1005 (Wash. 1955). Other courts have made similar declarations. *See Barbour* v. *Barbour,* 330 P.2d 1093, 1098 (Mont. 1958); *S.B.* v. *S.J.B.*, 609 A.2d 124, 125 (N.J. Super. Ct. Ch. Div. 1992); *Petition of Smith,* 71 F. Supp. 968, 972 (D.N.J. 1947). These examples plus many others indicate that the seventh commandment played an important role in American law and jurisprudence.

H. <u>The eighth commandment, "Do not steal," has impacted American law and jurisprudence.</u>

The eighth commandment also historically affected American law and jurisprudence. Chancellor James Kent, a "Father of American Jurisprudence," in

his classic 1826 *Commentaries on American Law* confirmed that laws prohibiting theft were found in divine law. "To overturn justice by plundering others tended to destroy civil society, to violate the law of nature, and the institutions of Heaven." James Kent, 1 *Commentaries on American Law*, 7 (1826). Subsequently, other legal authorities reaffirmed the divine origin behind the prohibition of theft. For example, in 1951, the Louisiana Supreme Court declared, "In the Ten Commandments, the basic law of all Christian countries, is found the admonition "Thou shalt not steal.'" *Succession of Onorato*, 51 So. 2d 804, 810 (La. 1951). In 1940, the Supreme Court of California made a similar declaration:

> Defendant did not acknowledge the dominance of a fundamental precept of honesty and fair dealing enjoined by the Decalogue and supported by prevailing moral concepts. "Thou shalt not steal" applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel.

Hollywood Motion Picture Equipment Co. v. Furer, 105 P.2d 299, 301 (Cal. 1940).

Significantly, other courts have acknowledged the same. *See De Rinzie* v. *People,* 138 P. 1009, 1010 (Colo. 1913); *Anderson* v. *Maddox*, 65 So. 2d 299, 301-02 (Fla. 1953); *Addison* v. *State,* 116 So. 629 (Fla. 1928); *State* v. *Gould,* 46 S.W.2d 886, 889-90 (Mo. 1932); *State* v. *Donaldson*, 99 P. 447, 449 (Utah 1909).

These and numerous other examples demonstrate that the eighth commandment historically impacted American law and jurisprudence.

I. <u>The ninth commandment, "Do not perjure yourself," has impacted American law and jurisprudence.</u>

The ninth commandment also historically influenced American law and jurisprudence. For example, a 1642 Connecticut law against perjury recognized its origin in divine law. "If any man rise up by false witness, wittingly and of purpose, to take away any man's life, he shall be put to death. Deut. 19:16, 18, 19." *The Code of 1650,* at 28-29*; see also Capital Laws of Connecticut, reprinted in Colonial Origins,* at 230. Similar laws were found in other colonies: Massachusetts in 1641, *Massachusetts Body Of Liberties, reprinted in Colonial Origins,* at 84, Rhode Island in 1647, *Acts and Orders of 1647, reprinted in Colonial Origins,* at 190-91; New Hampshire in 1680, *General Laws and Liberties of New Hampshire, reprinted in Colonial Origins,* at 7; and Connecticut in 1808, An Act for the Punishment of Divers Capital and Other Felonies, *The Public Statute Laws of the State of Connecticut* 295 (1808).

Courts have also openly recognized their indebtedness to the ninth commandment for perjury laws. For example, in 1924, the Oregon Supreme Court declared that "No official is above the law. 'Thou shalt not bear false witness' is a command of the Decalogue, and that forbidden act is denounced by statute as a felony." *Watts* v. *Gerking,* 228 P. 135, 141 (Or. 1924). In 1988, the Supreme Court of Mississippi cited to the

ninth commandment in instructing a prosecutor to not make accusations without evidence to support them.

> When the State or any party states or suggests the existence of certain damaging facts and offers no proof whatever to substantiate the allegations, a golden opportunity is afforded the opposing counsel in closing argument to appeal to the Ninth Commandment. "Thou shalt not bear false witness . . . ." Exodus 20:16.

Hosford v. *State,* 525 So. 2d 789, 799 (Miss. 1988).

Other courts have cited the ninth commandment as the source for laws against perjury. *See People* v. *Rosen*, 20 Cal. App. 2d 445, 448-449, (1937); *Pullum* v. *Johnson,* 647 So. 2d 254, 256 (Fla. Dist. Ct. App. 1994); *L.* v. *N.,* 326 S.W.2d 751, 755-756 (Mo. Ct. App. 1959). These and numerous other examples confirm that the ninth commandment played a role in American law and jurisprudence.

J. <u>The tenth commandment, "Do not covet," has impacted American law and jurisprudence</u>.

The tenth commandment also helped form American law and jurisprudence. Many courts have recognized that the tenth commandment forms the basis for several of their laws. For example, in 1895, the California Supreme Court cited this prohibition as the basis of laws against defamation. *Weinstock, Lubin & Co.* v. *Marks,* 42 P. 142, 145 (Cal. 1895). In 1904, the Court of Appeals in West Virginia cited it as the basis of laws preventing election fraud. *Doll v. Bender,* 47 S.E.

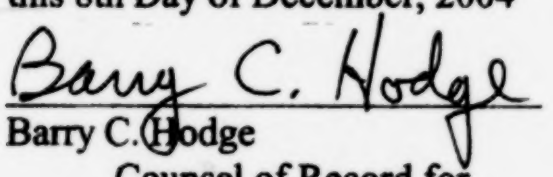
293, 300-01 (W.Va. 1904) (Dent, J. concurring). In 1958, a Florida appeals court cited it as the basis of laws targeting white-collar crime. *Chisman* v. *Moylan*, 105 So. 2d 186, 189 (Fla. Dist. Ct. App. 1958). And in 1951, the Oregon Supreme Court cited the tenth commandment prohibition as the basis of laws against modern forms of cattle rustling. *Swift & Co.* v. *Peterson*, 233 P.2d 216, 231 (Or. 1951). These and numerous other examples confirm that the tenth commandment affected American civil and jurisprudence.

CONCLUSION

Historical evidence, drawn from law codes, judicial decisions, and declarations of great American lawgivers, affirms and reaffirms that the entire Ten Commandments has made a seminal contribution to the early common law and still continues today to make a significant contribution to the modern common law. Aside from the Declaration of Independence, the Constitution, and the Bill of Rights, it is difficult to argue that there is any single work that has had a greater or more far-reaching impact on four centuries of American life, law, and culture than the Ten Commandments. For this reason alone, the Ten Commandments merits display.

For the foregoing reasons, the National Legal Foundation respectfully requests that this Court reverse the Sixth Circuit's decision.

Respectfully submitted
this 8th Day of December, 2004



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